CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~812~~ 79

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THEODORE MICHEL

No. ~~813~~ 80

THE UNITED STATES OF AMERICA, PETITIONER

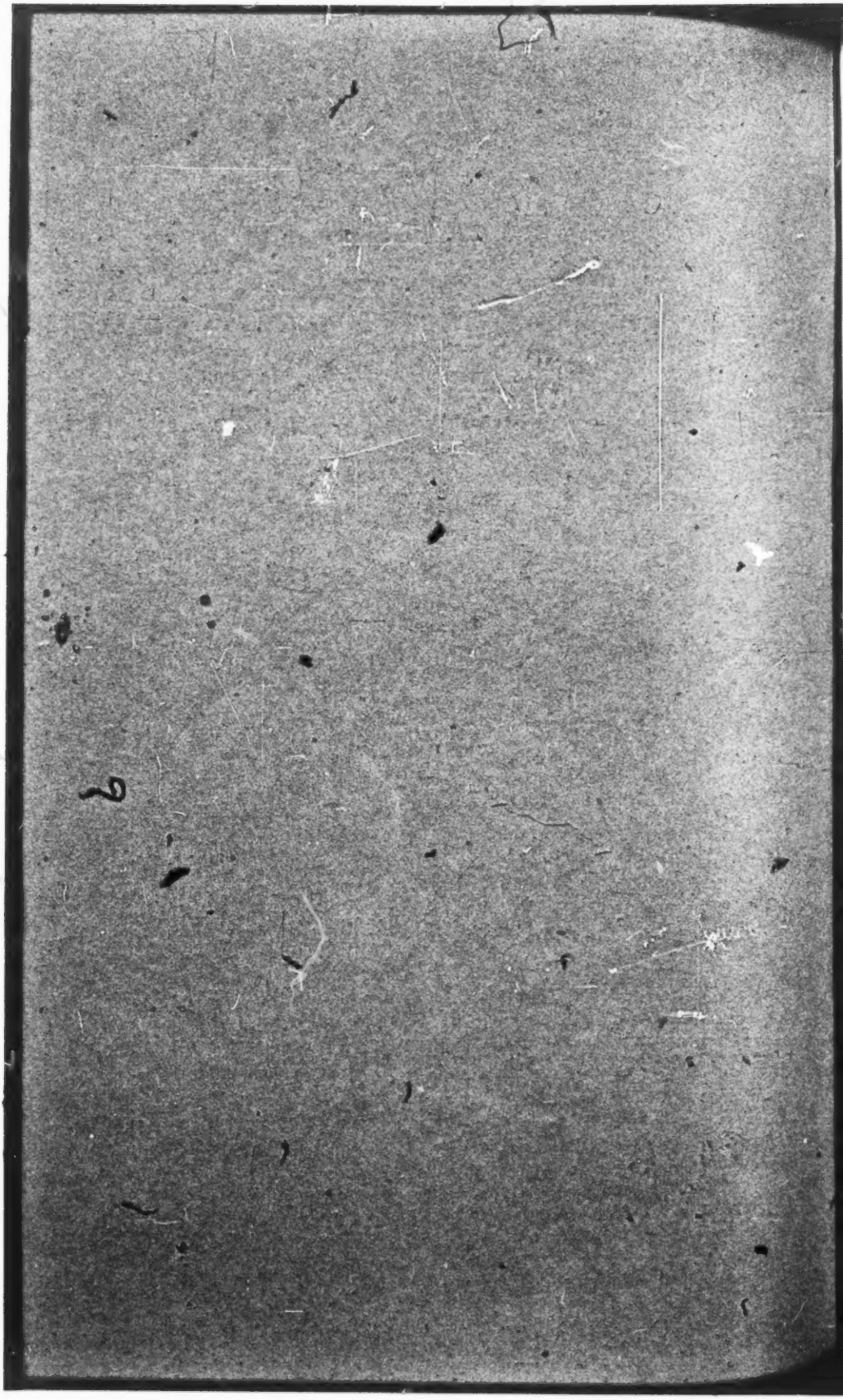
vs.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1930
CERTIORARI GRANTED MAY 19, 1930

(34943)
(34944)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 812

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THEODORE MICHEL

No. 813

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Southern District of New York

THEODORE MICHEL, PLAINTIFF
against
THE UNITED STATES OF AMERICA, DEFENDANT
No. L 43/211

Complaint

Plaintiff, by Donald Horne, his attorney, for his complaint against the United States of America, respectfully shows and alleges:

First. That at all times herein mentioned plaintiff was and now is a citizen of the United States and a resident of the Borough of Manhattan, City of New York, County of New York, State of New York; that during the year 1919, plaintiff was a member of the copartnership of Michel & Krieger, composed of Louis Krieger and Theodore Michel, plaintiff herein, which said copartnership was engaged in the business of manufacturing, converting and dealing in silks, with its principal office and place of business at Number 225 Fifth Avenue, in the Borough of Manhattan, City of New York, County of New York, State of New York.

Second. That during the year 1920, and from April 9, 1917,
2 to August 14, 1921, William H. Edwards was the collector of internal revenue for the second district of New York; that since August 14, 1921, said William H. Edwards has not been in office as collector of internal revenue.

Third. That on March 15, 1920, plaintiff duly filed with said William H. Edwards, as collector of internal revenue, his income tax return for the calendar year 1919, and paid the income tax thereon shown to be due, in four installments, as provided by law, as follows: On march 15, 1920, $5,954.85; on June 15, 1920, $5,954.85; on September 15, 1920, $5,985.85; on December 15, 1920, $5,984.85, a total of $23,819.40.

Fourth. That on or about February 7, 1924, plaintiff filed with the collector of internal revenue for the second district of New York his claim for refund of $23,641.63, stating therein that his income for 1919 had been overstated in the amount of $79,026.57; that said overstatement was due to overvaluation of the closing inventory in the return of income of Michel & Krieger, said copartnership; that on August 17, 1925, the Commissioner of Internal Revenue advised plaintiff by letter that said claim for refund would be rejected, and that this rejection would officially appear on the next schedule to be approved by him; that the Commissioner of Internal Revenue never notified plaintiff that the claim had been rejected, or the date of such rejection, until June 27, 1928; that on said last-mentioned date, the Commissioner of Internal Revenue notified plaintiff by letter that he had rejected the claim on September 2, 1925.

Fifth. That the schedule on which the rejection officially
3 appeared, referred to in the commissioner's letters to plaintiff dated August 17, 1925, and June 27, 1928, was a list of over-assessments, for transmission to the collector of internal revenue, and not furnished to, or available to plaintiff; that plaintiff had no notice that said schedule had been approved by the Commissioner of Internal Revenue until June 27, 1928, and that plaintiff received no notice of the rejection of his claim or the date thereof, until June 27, 1928.

Sixth. That section 3226 of the Revised Statutes of the United States, as amended by section 1014 of the revenue act of 1924, and reenacted without change by section 1113 of the revenue act of 1926, provides that a taxpayer may begin a suit for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected at any time within two years after the disallowance of the part of a claim for refund to which such suit relates, and that the Commissioner of Internal Revenue shall within ninety days after any such disallowance notify the taxpayer thereof by mail; that the Commissioner of Internal Revenue disallowed the part of plaintiff's claim to which this suit relates on September 2, 1925, and did not notify plaintiff thereof by mail or otherwise within ninety days after such disallowance, or until June 27, 1928, more than two years after such disallowance.

Seventh. That in computing the gross income of the partnership of Michel & Krieger, from which plaintiff derived his taxable income, the cost of goods sold was deducted from total gross sales, the balance remaining representing gross profit from sales; that in deter-
mining the cost of goods sold, the purchases made during the
4 year were added to the amount of the inventory as at December 31, 1918, and the amount of the inventory at December 31, 1919, was deducted from this total, the balance representing the cost of goods sold during the calendar year 1919; that in valuing both the inventory at December 31, 1918, and the inventory at December 31, 1919, items were, except as hereinafter stated, priced at cost or market, whichever was lower, in accordance with a method of valuation prescribed by the Treasury Department in article 1582 of regulation 45; that said partnership overestimated the demand for seasonable goods during 1919, consisting of goods in special designs, prints, patterns, and weaves; at December 31, 1919, said partnership had large quantities of such goods on hand, which were entirely out of style at that time; that at December 31, 1919, there was no market whatever for such goods, at any price; that said firm was unable to value such goods at market, because there was no market for them, and for that reason priced them at cost for the purposes of its inventory; that the original valuation of said goods at cost was $387,282.61; that while said goods were out of style and there was no market for them because there

was no demand, a fair valuation of said goods at December 31, 1919, based upon the prices at which they were offered to the trade by said firm in January, 1920, but found no buyers, was $229,229.46; that by reason of the overvaluation of the inventory of said firm as at December 31, 1919, its gross income and net income for the calendar year 1919 was overstated in the amount of $158,053.15.

Eighth. That the distributive shares of plaintiff in the net income of said firm of Michel & Krieger was 50 per cent thereof; that by reason of the overstatement of net income of said firm,
5 as above alleged, plaintiff erroneously reported as income and paid tax on the sum of $79,026.58; that without including said sum in plaintiff's net income, plaintiff was subject to an income tax of $177.77 for the calendar year 1919.

Ninth. That the difference between said sum of $23,819.40 and $177.77, to wit: $23,641.63, was erroneously assessed against and collected by defendant from plaintiff as income tax for the calendar year 1919; that no part of said sum of $23,641.63, the subject of this action, has been repaid to plaintiff, although demanded.

Tenth. That this is a suit of a civil nature which arises under the Constitution and laws of the United States of America, and is provided for by section 24 of the Judicial Code, as amended by section 1122, subdivision (c) of the revenue act of 1926.

Eleventh. That by reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of $23,641.63, with interest thereon at the rate of 6 per centum per annum as follows: On $5,910.41, from March 15, 1920; on $5,910.41, from June 15, 1920; on $5,910.41, from September 15, 1920; and on $5,910.40, from December 15, 1920.

Twelfth. That plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to its enemies, or aided in rebellion against the Government; that plaintiff is the sole owner of the claim set forth herein and has not assigned the same or any part thereof.

6 Wherefore, plaintiff demands judgment against defendant for the sum of $23,641.63, together with interest at the rate of 6 per centum per annum, as follows: On $5,910.41, from March 15, 1920; on $5,910.41, from June 15, 1920; on $5,910.41, from September 15, 1920; and on $5,910.40, from December 15, 1920; and for costs and disbursements of this action.

THEODERE MICHEL,
By (Sgd.) DONALD HORNE,
and
(Sgd.) MORTIMER J. WOHL,
Attorneys for Plaintiff.

[*Duly sworn to by Theodore Michel; jurat omitted in printing.*]

7 In United States District Court

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice that upon the complaint herein the undersigned will move this court at a term thereof for the hearing of motions to be held in and for the southern district of New York at the courthouse, room 235, in the old post office building, Park Row & Broadway, Borough of Manhattan, city of New York, on the 15th day of January, 1929, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action and for such other relief as may be proper.

Dated, New York, N. Y., January 10, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

United States Courts and Post Office Building, Borough of Manhattan, city of New York.

To DONALD HORNE,
120 Broadway, Borough of Manhattan, City of New York,
Attorney for Plaintiff.

8 In United States District Court

[Title omitted.]

Order granting motion to dismiss

Jan. 19, 1929

A motion having been duly made herein for an order dismissing the complaint on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action, and for such other relief as may be proper, and the said motion having come on to be heard at a term of this court for the hearing of motions, held in and for the southern district of New York, at the courthouse, room 235, old post office building, Borough of Manhattan, city of New York, on the 15th day of January, 1929.

Now, after hearing Donald Horne, Esq., attorney for the
9 plaintiff, in opposition to said motion, and Leon E. Spencer, Esq., assistant United States attorney, for defendant, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the motion to dismiss the complaint be and the same hereby is granted, and that judgment be entered dismissing the complaint, with costs.

T. D. THACHER,
U. S. D. J.

10 IN UNITED STATES DISTRICT COURT

No. L 43/211

THEODORE MICHEL, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Judgment

The defendant having moved for an order dismissing the complaint herein upon the ground that said complaint failed to state facts sufficient to constitute a cause of action and said motion by order of January 21st, 1929, having been duly granted with directions accordingly.

Now, on motion of Charles H. Tuttle, United States attorney for the southern district of New York, it is

Ordered, adjudged, and decreed that the complaint herein be, and it hereby is, dismissed and that defendant, United States of America, have judgment against the plaintiff, Theodore Michel, in the sum of $20.00, its costs as taxed.

ALEX. GILCHRIST, JR., *Clerk.*

11 In the United States District Court

[Title omitted.]

Assignment of errors

And now comes Theodore Michel, plaintiff above named, by his attorney, Donald Horne, and makes and files the following assignment of errors, and says that the judgment entered in this action on the 29th day of January, 1929, is in error and unjust for the following reasons:

1. That the United States District Court for the Southern District of New York erred in holding and adjudging that the complaint does not state facts sufficient to constitute a cause of action;

2. That the United States District Court for the Southern District of New York erred in granting the defendant's motion to dismiss the complaint herein and in directing the entry of judgment in favor of the defendant and against the plaintiff, dismissing the complaint on the merits;

3. That the United States District Court for the Southern District of New York erred in entering judgment dated January 29, 1929, in favor of the defendant and against the plaintiff, and dismissing the complaint on the merits.

12 Wherefore, plaintiff prays that the said judgment of the United States District Court for the Southern District of New York be reversed, and that this cause be remanded to the said district court for further proceedings.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

13 In United States District Court

[Title omitted.]

Notice and order allowing appeal

The above-named plaintiff, Theodore Michel, conceiving himself aggrieved by the judgment entered on January 29, 1929, in the above-entitled proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

And now, to wit, on April 18th, 1929; it is
Ordered, that the appeal be allowed as prayed for.

JNO. C. KNOX,
United States District Judge for the
Southern District of New York.

14 [Citation in usual form omitted in printing.]

15 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated, July 25, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant.
CHAS. H. TUTTLE,
Attorney for Defendant-Respondent,
U. S. Attorney.

16 [Clerk's certificate to foregoing transcript omitted in printing.]

17 In United States Circuit Court of Appeals, for the Second Circuit

Nos. 141, 142. October Term, 1929

Argued December 11, 1929. Decided January 6, 1930

THEODORE MICHEL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

LOUIS KRIEGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Opinion

Jan. 6, 1930

From judgments dismissing the complaints in each of the above cases on the ground that they stated no cause of action, the plaintiffs have appealed. Reversed.

The plaintiffs in the foregoing actions were partners. They seek a refund of income taxes and allege that the partnership income of the distributive shares on which they were taxed was erroneously determined because of overvaluation of closing inventory.

In the first action the complaint alleges that the plaintiff Michel filed an income tax return for the calendar year 1919 with the collector of internal revenue for the second district of New York, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on February 7, 1924, Michel filed a claim for a refund of a part of the tax, which was rejected by the commissioner on September 2, 1925; that Michel brought action to recover the tax subsequent to September 26, 1928. The commissioner, on August 17, 1925, advised Michel by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Michel that his claim had been rejected, or the date of the rejection, until June 27, 1928, when he notified him by letter that he had rejected the claim on September 2, 1925.

In the second action the complaint alleges that the plaintiff Krieger filed an income tax return for the calendar year 1919 with the collector of internal revenue for the fifth district of New Jersey,

on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on September 15, 1924, Krieger filed a claim for a refund of a portion of the tax, which was rejected by the commissioner on April 20, 1925; that Krieger brought action to recover the tax subsequent to September 26, 1928. The commissioner on April 2, 1925, advised Krieger by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Krieger that his
18 claim had been rejected or of the date of the rejection until June 27, 1928, when he notified him by letter that he had rejected the claim on April 20, 1925.

Thus in Michel's case the tax was paid in 1920 and the rejection of his claim occurred on September 2, 1925, but he was not notified of the rejection until June 27, 1928. In Krieger's case the tax was paid in 1920 and the rejection of his claim occurred on April 20, 1925, but he was not notified of the rejection until June 27, 1928. In both cases action to recover taxes was brought more than five years after the taxes were paid and more than two years after rejection of the claim, but within two years after notification that the claim had been rejected.

Upon the foregoing facts appearing in the complaints of Michel and Krieger, respectively, the trial judge held that each cause of action was barred by the statute of limitations, and granted judgments for the Government dismissing the complaints.

The statute of limitations which must be construed is section 3226 of the Revised Statutes, as amended by section 1113(a) of the revenue act of 1926 (26 U. S. C. A. § 156). The amended section, so far as relevant, reads as follows:

"Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disalowance notify the taxpayer thereof by mail."

Donald Horne, of New York City, for plaintiffs-appellants.

Charles H. Tuttle, U. S. Atty., of New York City (Leon E. Spencer, Asst. U. S. Atty., of New York City, of counsel), for the United States.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above): The question before us is the effect to be given to the provision of the statute that the Commissioner of Internal Revenue shall within ninety days after the disallowance of a claim to refund taxes notify the taxpayer thereof by mail.

If the words directing notice amount to no more than a regulation for the promotion of efficient administration and are not a requirement for the protection of the taxpayer, then the claim of each plaintiff is barred because more than two years have elapsed since his claim was rejected. But it is hard to suppose that the provision for notice was not primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute. The schedule of assessments which the commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the commissioner except the prescribed notice by mail. But notice of the commissioner's action is required by all the necessities of the case. While there is a general provision in the amended section 3226, supra, giving the taxpayer five years after payment of his tax within which to sue for the recovery of an overpayment, few persons wish to go to the trouble and expense of a lawsuit where relief may come through departmental action, especially when they are obliged to file refunding applications in all cases as a preliminary requisite. It was doubtless with this human element in view that the clause was inserted in the section as finally amended, allowing a special period within which to sue after a disallowance of the taxpayer's claim, and requiring notice of such disallowance.

Under the rule laid down by the Supreme Court in French v. Edwards, 13 Wall. 506, 511, 20 L. Ed. 702, the provision in section 3226 for notice to the taxpayer would seem to be mandatory. Justice Field there explained the principle of statutory construction as follows:

19 "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done

will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the commissioner advising the plaintiffs here that their claims "would be rejected" were sufficient notices to comply with the law. The statute, however, prescribes a notice "after" the disallowance. The word "after" is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the commissioner—a prophecy subject to a possible change of the latter's opinion. The rejection appearing on the schedule approved by the commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. (Girard Trust Co. v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524.) It is the rendering of this final decision of which notice had to be given.

In Mahoning Coal R. Co. v. United States (D. C.), 28 F. (2d) 917, Judge Paul Jones held that the statute of limitations we are considering had not run where no notice of the disallowance of the taxpayer's claim had been given, even though a period of more than two years subsequent to the date of the decision by the commissioner had elapsed.

It can not be denied that difficulties arise in treating the notice clause as mandatory. The section requires suit to be "begun within two years after the disallowance," and then prescribes a notice by mail "within 90 days after * * * disallowance." If the notice is given within the ninety days, the matter is simple; but, if the commissioner renders his decision and then waits for one year and eleven months before giving notice, or if notice is not given for more than two years after a decision is rendered, or is not given at all, when, if ever, would the statute begin to run? A literal reading of the act would remove the bar wherever the commissioner has not given notice within the ninety days; yet that would seem an unfortunate result. But we need go no further at present than to say that the commissioner gave no notice of his decision until about two months before the above actions were brought, and that the causes of action were not barred then even if they would ever become barred when a notice had not been mailed within ninety days after the decision of the commissioner. The provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run. By no other construction can its mandatory provision be given effect, and its various provisions be made congruous.

It is probably true that the taxpayers here were careless and might have found out long before they were given formal notices that their claims had been rejected, but the statute does not bar

the rights of taxpayers for failure to exercise due diligence, but only after such notice is given and such time has elapsed as the act prescribes.

Judgment in each case reversed, with leave to defendant to answer.

CHASE, *Circuit Judge*, dissents without opinion.

20 In United States Circuit Court of Appeals, Second Circuit

Jan. 13, 1930

THEODORE MICHEL, PLAINTIFF-APPELLANT
v.
UNITED STATES, DEFENDANT-APPELLEE

Decree

Filed Jan. 14, 1930

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said district could be, and it hereby is, reversed with leave to defendant to answer.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WM. PARKIN, *Clerk*.

21 [File endorsement omitted.]

22 [Clerk's certificate to foregoing transcript omitted in printing.]

23 In United States District Court, Southern District of New York

LOUIS KRIEGER, PLAINTIFF
against
THE UNITED STATES OF AMERICA, DEFENDANT } No. L. 43/210

Complaint

Plaintiff, by Donald Horne, his attorney, for his complaint against the United States of America, respectfully shows and alleges:

First. That at all times herein mentioned plaintiff was and now is a citizen of the United States and a resident of the city of Newark, county of Essex, State of New Jersey; that during the year 1919 plaintiff was a member of the co-partnership of Michel & Krieger, composed of Theodore Michel and Louis Krieger, plaintiff herein, which said co-partnership was engaged in the business of

manufacturing, converting, and dealing in silks, with its principal office and place of business at No. 225 Fifth Avenue, in the Borough of Manhattan, city of New York, county of New York, State of New York.

Second. That during the year 1920, and from June 1, 1914,
24 to May 31, 1921, Charles V. Duffy was the collector of internal revenue for the fifth district of New Jersey; that since May 31, 1921, said Charles V. Duffy has not been in office as collector of internal revenue.

Third. That on March 15, 1920, plaintiff duly filed with said Charles V. Duffy, as collector of internal revenue, his income tax return for the calendar year 1919, and paid the income tax thereon shown to be due, in four installments, as provided by law, as follows: On March 15, 1920, $6,000.00; on June 15, 1920 $4,500.00; on September 15, 1920, $4,500.00; on December 15, 1920, $4,993.47, a total of $19,993.47.

Fourth. That on September 15, 1924, plaintiff filed with the collector of internal revenue for the fifth district of New Jersey his claim for refund of $19,993.47, stating therein that his income for 1919 had been overstated in the amount of $79,026.57; that said overstatement was due to overvaluation of the closing inventory in the return of income of Michel & Krieger, said copartnership; that on April 2, 1925, the Commissioner of Internal Revenue advised plaintiff by letter that said claim for refund would be rejected, and that this rejection would officially appear on the next schedule to be approved by him; that the Commissioner of Internal Revenue never notified plaintiff that the claim had been rejected or the date of such rejection until June 27, 1928; that on said last-mentioned date the Commissioner of Internal Revenue notified plaintiff by letter that he rejected the claim on April 20, 1925.

Fifth. That the schedule on which the rejection officially appeared,
referred to in the commissioner's letters to plaintiff dated
25 April 2, 1925, and June 27, 1928, was a list of overassessments, for transmission to the collector of internal revenue, and not furnished to or available to plaintiff; that plaintiff had no notice that said schedule had been approved by the Commissioner of Internal Revenue until June 27, 1928, and that plaintiff received no notice of the rejection of his claim or the date thereof until June 27, 1928.

Sixth. That section 3226 of the Revised Statutes of the United States, as amended by section 1014 of the revenue act of 1924, and reenacted without change by section 1113 of the revenue act of 1926, provides that a taxpayer may begin a suit for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected at any time within two years after the disallowance of the part of a claim for refund to which such suit relates, and that the Commissioner of Internal Revenue shall within ninety days after any such disallowance notify the taxpayer thereof by mail; that the Commissioner of Internal Revenue disallowed the part of plaintiff's

claim to which this suit relates on April 20, 1925, and did not notify plaintiff thereof by mail or otherwise within ninety days after such disallowance, or until June 27, 1928, more than two years after such disallowance.

Seventh. That in computing the gross income of the partnership of Michel & Krieger, from which plaintiff derived his taxable income, the cost of goods sold was deducted from total gross sales, the balance remaining representing gross profit from sales; that in determining the cost of goods sold, the purchases made during the year were added to the amount of the inventory as at December 31, 1918, and
26 the amount of the inventory at December 31, 1919, was deducted from the total, the balance representing the cost of goods sold during the calendar year 1919; that in valuing both the inventory at December 31, 1918, and the inventory at December 31, 1919, items were, except as hereinafter stated, priced at cost or market, whichever was lower, in accordance with a method of valuation prescribed by the Treasury Department in Article 1582 of Regulation 45; that said partnership overestimated the demand for seasonable goods during 1919, consisting of goods in special designs, prints, patterns, and weaves; at December 31, 1919, said partnership had large quantities of such goods on hand, which were entirely out of style at that time; that at December 31, 1919, there was no market whatever for such goods, at any price; that said firm was unable to value such goods at market, because there was no market for them, and for that reason priced them at cost for the purposes of its inventory; that the original valuation of said goods at cost was $387,282.61; that while said goods were out of style, and there was no market for them because there was no demand, a fair valuation of said goods at December 31, 1919, based upon the prices at which they were offered to the trade by said firm in January, 1920, but found no buyers, was $229,229.46; that by reason of the overvaluation of the inventory of said firm as at December 31, 1919, in gross income and net income for the calendar year 1919 was overstated in the amount of $158,053.15.

Eighth. That the distributive share of plaintiff in the net income of said firm of Michel & Krieger was 50 per cent thereof; that by reason of the overstatement of net income of said firm, as
27 above alleged, plaintiff erroneously reported as income and paid tax on the sum of $79,026.58; that without including said sum in plaintiff's net income, plaintiff was subject to no income tax for the calendar year 1919.

Ninth. That said sum of $19,993.47 was erroneously assessed against and collected by defendant from plaintiff as income tax for the calendar year 1919; that no part of said sum of $19,993.47, the subject of this action, has been repaid to plaintiff, although demanded.

Tenth. That this is a suit of a civil nature which arises under the Constitution and laws of the United States of America, and is provided for by section 24 of the Judicial Code, as amended by section 1122, subdivision (c) of the revenue act of 1926.

Eleventh. That, by reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of $19,993.47, with interest thereon at the rate of 6 per centum per annum, as follows: On $6,000.00, from March 15, 1920; on $4,500.00, from June 15, 1920; on $4,500, from September 15, 1920; and on $4,993.47, from December 15, 1920.

Twelfth. That plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to its enemies, or aided in rebellion against the Government; that plaintiff is the sole owner of the claim set forth herein and has not assigned the same or any part thereof.

Wherefore, plaintiff demands judgment against defendant
28 for the sum of $19,993.47, together with interest at the rate of 6 per centum per annum, as follows: On $6,000.00, from March 15, 1920; on $4,500.00, from June 15, 1920; on $4,500.00, from September 15, 1920; and on $4,993.47, from December 15, 1920; and for costs and disbursements of this action.

LOUIS KRIEGER,
By (Sgd.) DONALD HORNE,
and
(Sgd.) MORTIMER J. WOHL,
Attorneys for Plaintiff.

[*Duly sworn to by Louis Krieger; jurat omitted in printing.*]

29 In United States District Court

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice that upon the complaint herein the undersigned will move this court at a term thereof for the hearing of motions to be held in and for the southern district of New York at the courthouse, room 235, in the old post office building, Park Row & Broadway, Borough of Manhattan, city of New York, on the 15th day of January, 1929, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that it does not state facts sufficient to
30 constitute a cause of action and for such other relief as may be proper.

Dated: New York, N. Y., January 10, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for Defendant.

United States Courts and Post Office Building, Borough of Manhattan, city of New York.

To DONALD HORNE,
120 Broadway, Borough of Manhattan, City of New York, Attorney for Plaintiff.

31 In United States District Court

[Title omitted.]

Order granting motion to dismiss

Jan. 19, 1929

A motion having been duly made herein for an order dismissing the complaint on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action, and for such other relief as may be proper, and the said motion having come on to be heard at a term of this court, for the hearing of motions held in and for the southern district of New York, at the courthouse, room 235, old post office building, Borough of Manhattan, city of New York, on the 15th day of January, 1929.

Now, after hearing Danold Horne, Esq., attorney for the plaintiff, in opposition to said motion, and Leon E. Spencer, Esq., as-
32 sistant United States attorney, attorney for defendant, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the motion to dismiss the complaint be, and the same hereby is, granted, and that judgment be entered dismissing the complaint, with costs.

T. D. THACHER,
U. S. D. J.

In the United States District Court

LOUIS KRIEGER, PLAINTIFF
vs.
UNITED STATES OF AMERICA, DEFENDANT
} No. L. 43, 210

Judgment

The defendant having moved for an order dismissing the complaint herein upon the ground that said complaint failed to state facts sufficient to constitute a cause of action and said motion by order of January 21st, 1929, having been duly granted with directions accordingly,

Now, on motion of Charles H. Tuttle, United States attorney for the southern district of New York, it is

33 Ordered, adjudged, and decreed that the complaint herein be, and it hereby is, dismissed and that defendant, United States of America, have judgment against the plaintiff, Louis Krieger, in the sum of $20.00, its costs as taxed.

ALEX. GILCHRIST, JR., *Clerk.*

In United States District Court

[Title omitted.]

Assignment of Errors

And now comes Louis Krieger, plaintiff above named, by his attorney, Donald Horne, and makes and files the following assignment of errors, and says that the judgment entered in this action on the 29th day of January, 1929, is in error and unjust for the following reasons:

1. That the United States District Court for the Southern District of New York erred in holding and adjudging that the complaint does not state facts sufficient to constitute a cause of action;

34 2. That the United States District Court for the Southern District of New York erred in granting the defendant's motion to dismiss the complaint herein and in directing the entry of judgment in favor of the defendant and against the plaintiff dismissing the complaint on the merits;

3. That the United States District Court for the Southern District of New York erred in entering judgment dated January 29, 1929, in favor of the defendant and against the plaintiff and dismissing the complaint on the merits.

Wherefore plaintiff prays that the said judgment of the United States District Court for the Southern District of New York be reversed and that this cause be remanded to the said district court for further proceedings.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

35 In United States District Court

[Title omitted.]

Notice and order allowing appeal

The above-named plaintiff, Louis Krieger, conceiving himself aggrieved by the judgment entered on January 29, 1929, in the above-entitled proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

And now, to wit, on April 18th, 1929, it is
Ordered that the appeal be allowed as prayed for.

JNO. C. KNOX,
United States District Judge for the
Southern District of New York.

36 [Citation in usual form omitted in printing.]

37 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated July 25, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant.
CHAS. H. TUTTLE,
Attorney for Defendant-Respondent,
U. S. Attorney.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 In United States Circuit Court of Appeals for the Second Circuit

Nos. 141, 142—October Term, 1929

Argued December 11, 1929. Decided January 6, 1930

THEODORE MICHEL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

LOUIS KRIEGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Opinion

January 6, 1930

From judgments dismissing the complaints in each of the above cases on the ground that they stated no cause of action, the plaintiffs have appealed. Reversed.

The plaintiffs in the foregoing actions were partners. They seek a refund of income taxes and allege that the partnership income of the distributive shares on which they were taxed was erroneously determined because of overvaluation of closing inventory.

In the first action the complaint alleges that the plaintiff Michel filed an income-tax return for the calendar year 1919 with the collector of internal revenue for the second district of New York, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on February 7, 1924, Michel filed a claim for a refund of a part of the tax, which was rejected by the commissioner on September 2, 1925; that Michel brought action to recover the tax subsequent to September 26, 1928. The commissioner, on August 17, 1925, advised Michel by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Michel that his claim had been rejected, or the date of the rejection, until June 27, 1928, when he notified him by letter that he had rejected the claim on September 2, 1925.

In the second action the complaint alleges that the plaintiff Krieger filed an income-tax return for the calendar year 1919 with the collector of internal revenue for the fifth district of New Jersey, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on September 15, 1924, Krieger filed a claim for a refund of a portion of the tax, which was rejected by the commissioner on April 20, 1925; that Krieger brought action to recover the tax subsequent to September 26, 1928. The commissioner on April 2, 1925, advised Krieger by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Krieger that his
40 claim had been rejected or of the date of the rejection until June 27, 1928, when he notified him by letter that he had rejected the claim on April 20, 1925.

Thus in Michel's case the tax was paid in 1920 and the rejection of his claim occurred on September 2, 1925, but he was not notified of the rejection until June 27, 1928. In Krieger's case the tax was paid in 1920 and the rejection of his claim occurred on April 20, 1925, but he was not notified of the rejection until June 27, 1928. In both cases action to recover taxes was brought more than five years after the taxes were paid and more than two years after rejection of the claim, but within two years after notification that the claim had been rejected.

Upon the foregoing facts appearing in the complaints of Michel and Krieger, respectively, the trial judge held that each cause of action was barred by the statute of limitations, and granted judgments for the Government, dismissing the complaints.

The statute of limitations which must be construed is section 3226 of the Revised Statutes, as amended by section 1113 (a) of the revenue act of 1926 (26 U. S. C. A. § 156). The amended section, so far as relevant, reads as follows:

"Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."

Donald Horne, of New York City, for plaintiffs-appellants.

Charles H. Tuttle, U. S. Atty., of New York City (Leon E. Spencer, Asst. U. S. Atty., of New York City, of counsel), for the United States.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above): The question before us is the effect to be given to the provision of the statute that the Commissioner of Internal Revenue shall within ninety days after the disallowance of a claim to refund taxes notify the taxpayer thereof by mail.

If the words directing notice amount to no more than a regulation for the promotion of efficient administration and are not a requirement for the protection of the taxpayer, then the claim of each plaintiff is barred because more than two years have elapsed since his claim was rejected. But it is hard to suppose that the provision for notice was not primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute. The schedule of assessments which the commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the commissioner except the prescribed notice by mail. But notice of the commissioner's action is required by all the necessities of the case. While there is a general provision in the amended section 3226, supra, giving the taxpayer five years after payment of his tax within which to sue for the recovery of an overpayment, few persons wish to go to the trouble and expense of a lawsuit where relief may come through departmental action, especially when they are obliged to file refunding applications in all cases as a preliminary requisite. It was doubtless with this human element in view that the clause was inserted in the section as finally amended, allowing a special period within which to sue after a disallowance of the taxpayer's claim, and requiring notice of such disallowance.

Under the rule laid down by the Supreme Court in French v. Edwards (13 Wall. 506, 511, 20 L. Ed. 702) the provision in section 3226 for notice to the taxpayer would seem to be mandatory. Justice Field there explained the principle of statutory construction as follows:

41 "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the commissioner advising the plaintiffs here that their claims "would be rejected" were sufficient notices to comply with the law. The statute, however, prescribes a notice "after" the disallowance. The word "after" is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the commissioner—a prophecy subject to a possible change of the latter's opinion. The rejection appearing on the schedule approved by the commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. (Girard Trust Co. v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524.) It is the rendering of this final decision of which notice had to be given.

In Mahoning Coal R. Co. v. United States (D. C.) 28 F. (2d) 917, Judge Paul Jones held that the statute of limitations we are considering had not run where no notice of the disallowance of the taxpayer's claim had been given, even though a period of more than two years subsequent to the date of the decision by the commissioner had elapsed.

It cannot be denied that difficulties arise in treating the notice clause as mandatory. The section requires suit to be "begun within two years after the disallowance," and then prescribes a notice by mail "within 90 days after * * * disallowance." If the notice is given within the ninety days, the matter is simple; but, if the commissioner renders his decision and then waits for one year and eleven months before giving notice, or if notice is not given for more

than two years after a decision is rendered, or is not given at all, when, if ever, would the statute begin to run? A literal reading of the act would remove the bar wherever the commissioner has not given notice within the ninety days; yet that would seem an unfortunate result. But we need go no further at present than to say that the commissioner gave no notice of his decision until about two months before the above actions were brought, and that the causes of action were not barred then even if they would ever become barred when a notice had not been mailed within ninety days after the decision of the commissioner. The provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run. By no other construction can its mandatory provision be given effect and its various provisions be made congruous.

It is probably true that the taxpayers here were careless and might have found out long before they were given formal notices that their claims had been rejected, but the statute does not bar the rights of taxpayers for failure to exercise due diligence but only after such notice is given and such time has elapsed as the act prescribes.

Judgment in each case reversed, with leave to defendant to answer.

CHASE, Circuit Judge, dissents, without opinion.

42 In United States Circuit Court of Appeals, Second Circuit

Jan. 13, 1930

LOUIS KRIEGER, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decree

Filed Jan. 14, 1930

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be, and it hereby is, reversed, with leave to defendant to answer.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WILLIAM PARKIN, *Clerk.*

43 [File endorsement omitted.]

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 Supreme Court of the United States

THE UNITED STATES OF AMERICA, PETITIONER
vs.
THEODORE MICHEL

Order allowing certiorari

Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

46 Supreme Court of the United States

THE UNITED STATES OF AMERICA, PETITIONER
vs.
LOUIS KRIEGER

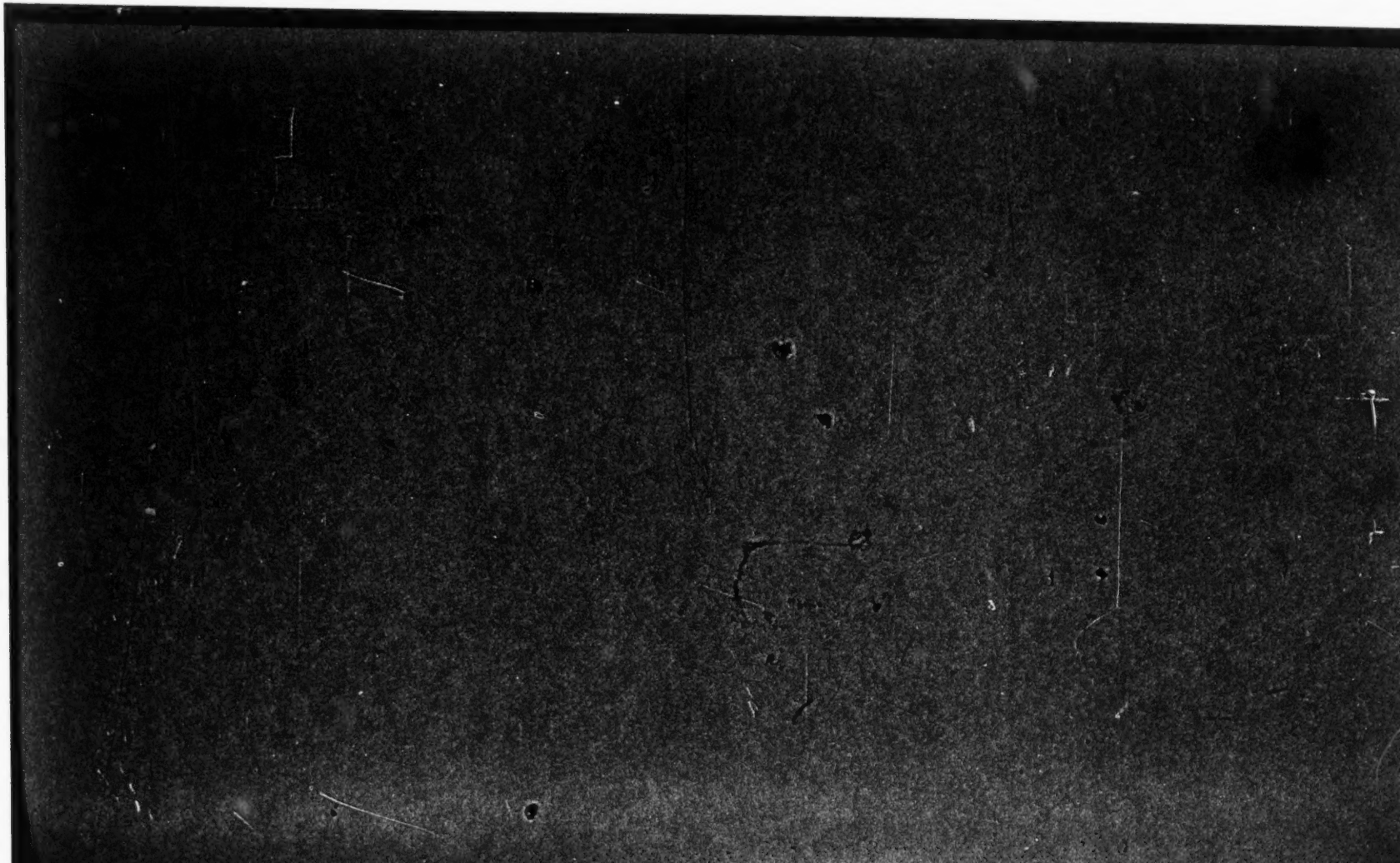
Order allowing certiorari

Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 34943, 34944. U. S. Circuit Court of Appeals, Second Circuit. Term No. 812. The United States of America, petitioner, vs. Theodore Michel. Term No. 813. The United States of America, petitioner, vs. Louis Krieger. Petition for writs of certiorari and exhibits thereto. Filed April 12, 1930. File Nos. 34943, 34944.

U. S. GOVERNMENT PRINTING OFFICE: 1930



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In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General on behalf of the United States prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cases on January 14, 1930, reversing the judgments of the District Court of the United States for the Southern District of New York.

STATEMENT

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory. (Michel, R. 1–6; Krieger, R. 1–6.) In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but less than two years after notification of the taxpayer that the claim had been officially rejected.

In the *Michel case* the complaint alleged (R. 2): The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15, and December 15, of that year; a claim for refund of a portion of said tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him; and under date of June 27, 1928, the Commissioner notified the taxpayer that the claim had been rejected on September 2, 1925. Action in the District Court to recover the tax was begun subsequent to the verification of the complaint on September 26, 1928. (R. 6.)

In the *Krieger case* the complaint alleged (R. 2): The taxpayer's return for 1919 was filed on March 15, 1920, and that the tax shown to be due thereon was paid in four instalments on March 15, June 15, September 15, and December 15, 1920; claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; and, under date of June 27, 1928, the taxpayer was notified that his claim for refund had been rejected on April 20, 1925. Action in the District Court was begun subsequent to the verification of the complaint on September 26, 1928. (R. 6.)

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint. (Michel, R. 7–10; Krieger, R. 7–11.) The court rendered no opinion.

On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding, by a divided court, that, although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run as the actions were instituted within two years after notification that the claims had been rejected.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that actions to recover taxes, begun more than five years

after payment and more than two years after the disallowance of claims for refund, were not barred by Section 3226 of the Revised Statutes as amended.

REASONS FOR GRANTING THE WRITS

The decision of the Circuit Court of Appeals in the instant cases is far-reaching in effect since it opens the way for litigation in a great number of cases which the Treasury had considered closed. Prior to September 1, 1928, it was the custom of the Treasury Department to notify taxpayers of the Commissioner's determination with respect to claims for refund a short time prior to the official rejection thereof, but no additional notice was given taxpayers after the approval of the official schedule of rejections. Under the decision of the court below the statute of limitations as to suits has not commenced to run in cases where the claims were rejected pursuant to this practice. We are advised by the Bureau of Internal Revenue that there are thousands of these claims which amount in the aggregate to more than two billions of dollars.

The decision is important from an administrative standpoint, since the reopening of claims by the Bureau is dependent upon whether the statute of limitations has run against suits to recover taxes. Where, as here, a notice was mailed more than 90 days after the rejection there is uncertainty under this decision whether the claim may be reconsidered by the Treasury.

The statute involved is ambiguous and the decisions of the courts are not in harmony as to its construc-

tion. The instant cases therefore present an important question of Federal tax law, which, we submit, should be authoritatively determined by this Court.

Wherefore it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (Michel, R. 17–21; Krieger, R. 17–21) is reported in 37 F. (2d) 38

JURISDICTION

The judgments of the Circuit Court of Appeals were entered January 14, 1930. (Michel, R. 21; Krieger, R. 21.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Commissioner of Internal Revenue does not notify a taxpayer within ninety days after the official rejection of a claim for refund, is an action, brought more than five years after payment of the tax and more than two years after the disallowance of the claim for refund, barred under the provisions of Section 3226 of the Revised Statutes as amended

and reenacted in Section 1113 of the Revenue Act of 1926?

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156), provides in part as follows:

> SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such

disallowance notify the taxpayer thereof by mail."

The pertinent provisions of Treasury Regulations 69 promulgated under the Revenue Act of 1926 are as follows:

> ART. 1351. *Suits for recovery of taxes erroneously collected.*—Under the provisions of section 3226 of the Revised Statutes, as amended by the Revenue Act of 1924 and reenacted without change by section 1113 of the Revenue Act of 1926, no suit or proceeding by any person for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, can be maintained in any court until a claim for refund or credit has been duly filed with the Commissioner (see section 284 and articles 1301–1306) and six months have elapsed from the date of filing such claim, unless the Commissioner renders a decision within six months, in which case suit may be brought upon the rendition of the decision. No suit or proceeding in court can be brought after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The statute requires that the Commissioner shall notify the claimant by mail of the disallowance of the claim for refund or credit

within 90 days after such disallowance. Payment of the tax, penalty, or other sum under protest or duress is not a prerequisite to the bringing of such suit or proceeding.

Section 3226 of the Revised Statutes, as amended, outlines the only manner in which a suit may be brought by any person for the recovery of taxes erroneously or illegally assessed or collected or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any person bringing such suit or proceeding is required.

STATEMENT

A statement of the facts and of the error relied on is contained in the petition.

ARGUMENT

The express terms of Section 3226 of the Revised Statutes as amended by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, and reenacted without change by Section 1014 of the Revenue Act of 1924 and by Section 1113 of the Revenue Act of 1926, require that a taxpayer to recover taxes alleged to have been erroneously or illegally collected must begin his action within five years after payment of the taxes or within two years after the disallowance of the claim for refund. In the instant cases neither of the respondents brought his action within five years after payment of the taxes or within two years after the disallowance of his claim for refund by the Commissioner of Internal Revenue. Respondents con-

tended, and the Circuit Court of Appeals held, that although their actions were not commenced within the five-year period or the two-year period, the statute of limitations had not run as the actions were instituted within two years after notice that the refund claims had been officially disallowed.

We submit that the Circuit Court of Appeals has applied an interpretation to the statute which is contrary to its express language. The disallowance of a claim for refund takes place when the schedule is approved by the Commissioner and not when the taxpayer is notified of that act. *Girard Trust Co.* v. *United States*, 270 U. S. 163. The effect of the decision of the court below is (1) that the clause providing for notice by mail within ninety days after the disallowance of a claim for refund is mandatory, (2) that if such notice is given within ninety days the two-year period of limitations begins to run from the date the rejection schedule is approved, and (3) that if no notice is given to the taxpayer after the approval of the rejection schedule the two-year period is never set in motion. When, if ever, an action would be barred if notice of disallowance is given after ninety days but within the two-year period was not decided. The logical implication from the decision is that there would be no bar at all. Such a result the court below characterized as unfortunate.

In reaching its conclusion the court below invoked the principle of statutory construction laid down in *French* v. *Edwards*, 13 Wall. 506, 511, and held that the provision as to notice was intended for the

protection of the taxpayer and was therefore mandatory. See also *Lyon* v. *Alley*, 130 U. S. 177; *Marx* v. *Hanthorn*, 148 U. S. 172, 180; *Erhardt* v. *Schroeder*, 155 U. S. 124. In the case last mentioned the Court, applying the same test, held that the provision of Section 2939 of the Revised Statutes requiring a collector of customs to examine and appraise not less than one package out of every ten was not mandatory but directory, saying (p. 129):

> The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance, and the substantial protection of the government, as mandatory, and to consider official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights of property. Cooley on Taxation, 215, 216.

In *Hubbert* v. *Campbellsville Lumber Co.*, 191 U. S. 70, the Court refrained from stating a general rule and said (p. 76):

> "By directory provision," says Judge Cooley, "is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them." Cooley's Constitutional Limitations, star page 74.
>
> "Lord Penzance, in *Howard* v. *Bodington*, L. R. 2 P. Div. 211, after commenting on the difficulty of gathering any rule from the cases,

> said: 'I believe, as far as any rule is concerned, you can not safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the matter is what is called imperative or directory.'"

Prior to the Act of March 4, 1923, the taxpayer's right to bring action to recover taxes was limited to five years after the day of payment. That Act amended the statute, giving the taxpayer the additional right to sue within two years after the disallowance of his claim for refund and providing that the Commissioner should within ninety days notify him by mail of such disallowance. In the instant cases respondents were notified that their claims would be disallowed and that the disallowances would officially appear on the next schedule to be signed by the Commissioner. They had therefore actual notice that their claims would be denied and the general object intended by the notice provision of the statute was secured. As a practical matter respondents suffered no injury by reason of the failure of the Commissioner to give them a second notice after the official disallowance.

The statute in question has not been uniformly construed by the courts. See *Mahoning Coal R. Co.* v. *United States* (N. D. Ohio), 28 F. (2d) 917; *Southwestern Oil & Gas Co.* v. *United States* (W. D. Pa.), 29 F. (2d) 404; *McKesson & Robbins, Inc.*, v.

Edwards (S. D. N. Y., decided February 5, 1930, not yet reported); *Leonard* v. *United States* (Ct. Cls., decided June 3, 1929, not yet reported).

In the *Mahoning case, supra,* the court took the same view of the question as did the court below. The cases are distinguishable, in that the taxpayers in the *Mahoning case* had no actual notice of the disallowance of their claims for refund.

In the *Southwestern Oil & Gas Co. case, supra,* it was held that the statute began to run from the date of a letter advising the taxpayer that his refund claim had been reopened and reconsidered and that the Commissioner's former ruling would be adhered to, rather than from the date of notification that the original claim for refund would be rejected. The court apparently did not consider the date of approval of the official schedule of rejection as controlling.

On appeal (34 F. (2d) 446), this point was not involved.

In the *McKesson & Robbins case, supra,* the court held that where the taxpayer was advised, as were the taxpayers in the instant cases, that his claim would be rejected and would appear on the next schedule to be approved, the statute began to run from the date the official schedule was signed, notwithstanding the fact that the Commissioner as a matter of courtesy sent the taxpayer a second letter of rejection after the official disallowance.

In the *Leonard case, supra,* it was held that a suit instituted more than five years after the date of payment of the tax was barred although a claim for

refund had been filed and had never been acted upon by the Commissioner of Internal Revenue.

CONCLUSION

In view of the importance of the question involved and the need of an authoritative decision by this Court, it is respectfully submitted that writs of certiorari should issue.

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APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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Office Supreme Court
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CHARLES ELMORE

Nos. 79 and 80

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

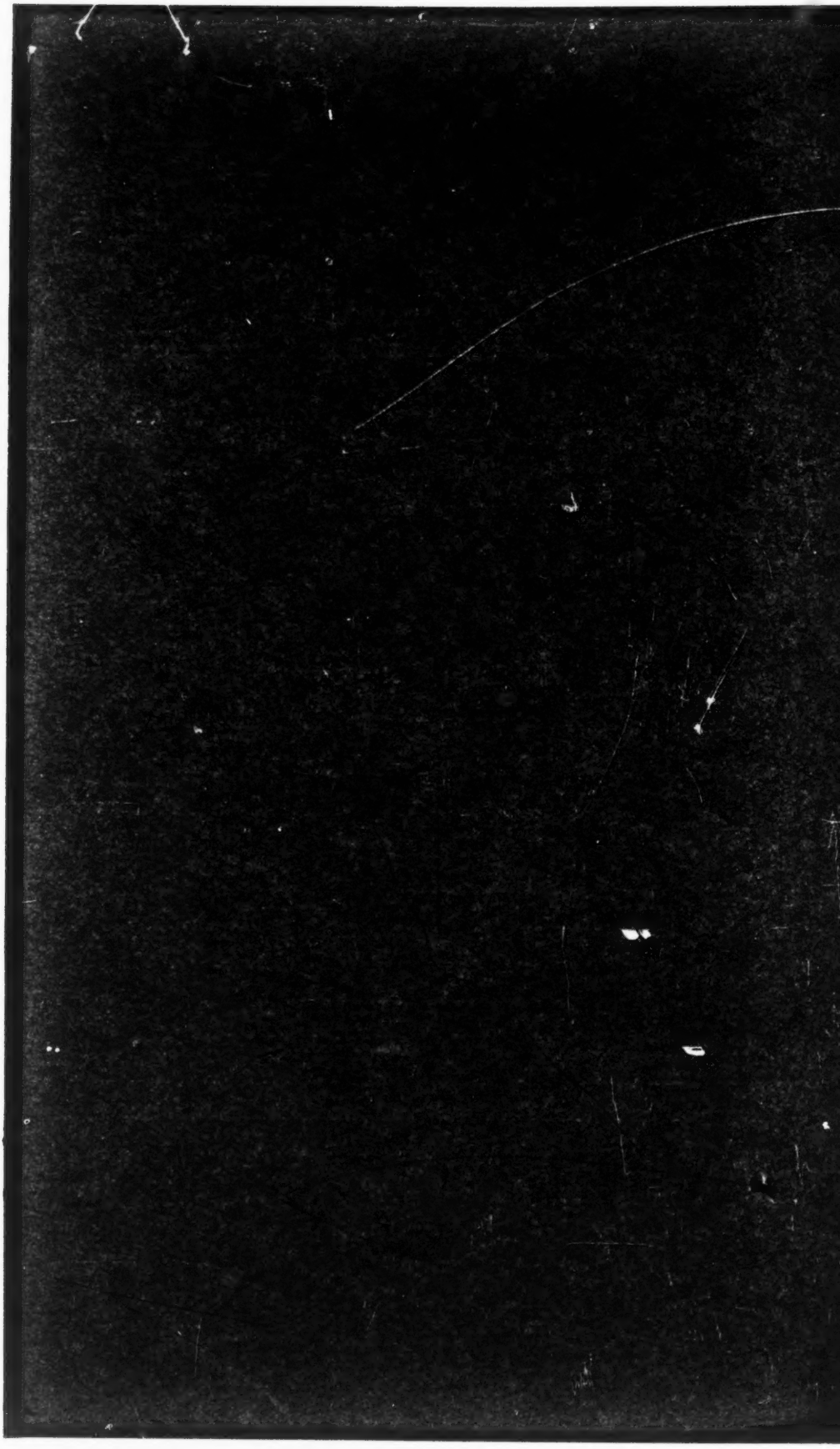
THE UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 79

THE UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

No. 80

THE UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court for the Southern District of New York rendered no opinion. The opinion of the Circuit Court of Appeals (R. 7–11, 17–21) is reported in 37 F. (2d) 38.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered January 14, 1930. (R. 11, 21.) The

petition for writs of certiorari was filed April 12, 1930, and the writs were granted on May 19, 1930. (R. 22.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Commissioner of Internal Revenue does not notify a taxpayer within ninety days after the final rejection of a claim for refund, is an action brought more than five years after payment of the tax, and more than two years after the disallowance of the claim for refund, barred under the provisions of Section 3226 of the Revised Statutes as amended and reenacted in Section 1113 of the Revenue Act of 1926?

STATUTE INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156) provides in part:

> SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ac-

cording to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

STATEMENT

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes paid for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory. (R. 1–3; 11–14.) In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but less than two years after notifica-

tion to the taxpayer that the claim had been officially rejected.

In the *Michel case* the complaint alleged: The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15, and December 15 of that year; a claim for refund of a portion of the tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him (R. 1); the claim was so rejected by the Commissioner on September 2, 1925 (R. 2); and under the date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection (R. 1). Action in the District Court to recover the tax was begun subsequent to September 26, 1928. (R. 7.)

In the *Krieger case* the complaint alleged (R. 12): The taxpayer's return for 1919 was filed on March 15, 1920, and the tax shown to be due thereon was paid in four installments on March 15, June 15, September 15, and December 15, 1920; a claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; the claim was so re-

jected by the Commissioner on April 20, 1925; and under date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection. Action in the District Court was begun subsequent to September 26, 1928. (R. 8.)

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint. (R. 4–5; 15.) On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding, by a divided court, that, although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run as the actions were instituted within two years after notification that the claims had been rejected.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in holding that actions to recover taxes, begun more than five years after payment and more than two years after the disallowance of claims for refund, were not barred by Section 3226 of the Revised Statutes as amended.

SUMMARY OF ARGUMENT

I. The running of the period of the Statute of Limitations is started by the rejection of the claim for refund and not by the notice of the rejection. Section 3226 of the Revised Statutes, as amended,

provides that no suit to recover taxes illegally or erroneously collected shall be brought more than five years after the tax was paid, unless a claim for refund was filed, in which case the suit may be brought within two years after the claim for refund is rejected. It further provides that the Commissioner shall notify the taxpayer within ninety days after the disallowance of the claim for refund. The language of the statute as to the bringing of suits is unqualified, and we submit that the court below erred in reading into it an exception based on the Commissioner's failure to give the taxpayers formal notice of his rejection of their claims for refund.

II. The legislative history indicates that the limitation period begins when the refund claim is rejected. The committee reports refer to the bringing of suit within two years after the "disallowance" of the claim for refund. They fail to disclose any intention on the part of Congress that this period should be extended by the failure of the Commissioner of Internal Revenue to give notice of the rejection.

III. The requirement that notice be given was substantially complied with. The taxpayers were notified that their claims would be rejected a short time before the formal rejection of the claims. This was in accordance with the uniform practice of the Treasury Department, and we submit that it constituted a substantial compliance with the terms of the statute.

ARGUMENT

I

THE RUNNING OF THE PERIOD OF THE STATUTE OF LIMITATIONS IS STARTED BY THE REJECTION OF THE CLAIM FOR REFUND AND NOT BY THE NOTICE OF THE REJECTION

Prior to its amendment in 1923, Section 3226 of the Revised Statutes provided that no suit to recover taxes illegally or erroneously collected could be brought unless a claim for refund or credit of the tax had been filed. It further provided—

> No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum.

This section was amended by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, by inserting at the end of the matter just quoted the following—

> unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

As so amended, Section 3226 was reenacted without change by Section 1014 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343 (U. S. C., Title 26, Sec. 156), and by Section 1113 (a) of the Revenue

Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156).

In the present cases neither action was brought within five years after payment of the tax nor within two years after the disallowance of the claim for refund. But the respondents contended, and the Circuit Court of Appeals held, that the actions were not barred because they were instituted within two years after notice that the claim for refund had been officially disallowed. The basis for the holding apparently was that the provision for notice contained in the amendment made by the Act of March 4, 1923, *supra*, was mandatory and that failure to give the notice prevented the running of the statute.

If, for the sake of argument, it be conceded that after the passage of the Act of March 4, 1923, *supra*, it was the duty of the Commissioner of Internal Revenue to notify taxpayers of the disallowance of claims for refunds,[1] it does not follow that the Commissioner's failure to comply with this requirement of the statute prevented the statute of limitations from running. The statute prescribed a duty, but it did not provide any consequence for the failure to perform that duty. The wording of the statute is plain. It provides that no suit can be brought more than five years after the payment of the tax, unless a claim for refund was filed and the suit is brought

[1]An argument to the contrary might be made. Cf. *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100.

within two years after the disallowance of the claim. This language is unqualified, and we submit that the court below erred in reading into it an exception based on the Commissioner's failure to give the taxpayers formal notice of his rejection of their claims for refund.

The United States may not be sued without its consent. Where consent is extended by statute such a statute must be strictly construed in favor of the Government, especially as to the time for bringing suit. *United States* v. *Whited & Wheless*, 246 U. S. 552, 561; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462.[2] If the giving of the notice specified in the amendment to Section 3226 is to be construed as a condition precedent to the running of the time for bringing suit against the Government, it follows that the Government has waived its right not to be bound by the negligence or default of its administrative officers. *Cf. United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 314; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. The Government should not be held to have waived any sovereign right or privilege un-

[2] We submit that the statements in *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350, and in *United States* v. *Updike*, 281 U. S. 489, 496, to the effect that provisions of limitation in taxing Acts are to be construed liberally in favor of the taxpayer, are not applicable here. The statutes discussed in these cases limited the right of the United States to bring proceedings. The statute under consideration limits the taxpayer's right to bring suit. It did not originate as part of a general taxing Act.

less it has plainly so provided. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462, *supra.*

The effect of the decision of the court below is to construe the statute as though it provided that (1) if notice is given within ninety days, the limitation period expires two years after the date of rejection; (2) if no notice is given there is no period of limitations, as was held in *Mahoning Coal R. Co.* v. *United States,* 28 F. (2d) 917 (N. D. Ohio); and (3) if notice is given more than ninety days after the rejection, suit may thereafter be maintained, although the court does not point out what limitation, if any, is then imposed. This construction adopts the date of rejection as marking the beginning of the period of limitation in cases where notice is given within ninety days; in all other cases the date of the notice is apparently substituted for the date of rejection. It is submitted that the language of the statute does not permit such a substitution. Had Congress intended to make the giving of notice, rather than the act of rejection, the force that set the statute in motion, it could have made its purpose clear, and its failure to do so indicated a contrary intent. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 169.

The court below relied on *French* v. *Edwards,* 13 Wall. 506. We submit that this decision is clearly distinguishable from the instant case on its facts. *French* v. *Edwards* involved the validity of a tax deed. It appeared that the statutes of California provided that the sheriff in selling property "shall

only sell the smallest quantity that any purchaser will take and pay the judgment and all costs." This Court held that the failure of the sheriff to comply with this statutory provision made the tax deed invalid. This was simply an application of the familiar rule that before a person can be divested of his property without his consent, all the statutory requirements must be strictly complied with. But the decision has no bearing on the question when the period of the Statute of Limitations begins to run. The statute involved in *French* v. *Edwards* operated to deprive a person of his property, while the statute involved in the instant case operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before.

II

THE LEGISLATIVE HISTORY INDICATES THAT THE LIMITATION PERIOD BEGINS WHEN THE REFUND CLAIM IS REJECTED

The language here under consideration was added to Section 3226 of the Revised Statutes by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, *supra*. The original bill, from which this Act was derived, made no mention of Section 3226, but was confined to an amendment of Section 252 of the Revenue Act of 1921, relating to refunds. The amendment to Section 3226 was proposed by the Finance Committee of the Senate. The report of that committee reprints a brief which was pre-

sented to it, which contains the following language (Senate Report No. 1137, 67th Congress, 4th Session, p. 5):

> If the section be amended, as above suggested, the taxpayer will not have to start any suit until after it has been definitely determined that the bureau has disallowed his claim. He ought to have two years after such disallowance to begin that suit, because during that two years further negotiations with the bureau may result in the case being settled without suit.

The Finance Committee Report also referred to the amendment of Section 3226 as follows (p. 8):

> This is a new section amending section 3226 of the Revised Statutes to permit bringing suits within two years after the disallowance of a claim, the statute of limitations notwithstanding, and is recommended by the Treasury Department.

The suggested amendment was passed by the Senate. When the bill was sent to conference a slight change in the wording of the amendment was made. The Conference Report (House Report No. 1757, 67th Congress, 4th Session, p. 3) states:

> This amendment provides that a taxpayer may file suit for recovery of internal-revenue taxes within two years from the disallowance by the Commissioner of Internal Revenue of his claim therefor. The House recedes with an amendment making clerical changes.

None of these reports makes any reference to the notice to be given by the Commissioner. All of them refer to the bringing of suit within two years after the "disallowance" of the claim for refund. They indicate that Congress intended the date of rejection of the claim for refund as the date on which the period of limitations should start, and they fail to disclose any intention on the part of Congress that this period should be extended by the failure of the Commissioner of Internal Revenue to give notice of the rejection of the claim for refund.

III

THE REQUIREMENT THAT NOTICE BE GIVEN WAS SUBSTANTIALLY COMPLIED WITH

In the practice of the Treasury Department the official rejections of claims for refund have been recorded on schedules which were periodically approved by the Commissioner of Internal Revenue. Prior to some time in 1928 it was the practice of the Treasury Department to notify taxpayers of the determination of the Commissioner with respect to claims for refunds a short time prior to the official rejection of the claims, but it was not the practice to give further notice after the approval of the schedule.

The practice outlined above was followed in the instant case, and notice was sent to each respondent

advising him that his "claim for refund would be rejected and that this rejection would officially appear on the next schedule to be approved by" the Commissioner. (R. 1, 12.) The approval of the schedule occurred less than three weeks after the mailing of the notice. The giving of a notice in that form shortly before the rejection appeared on the official schedule has been held to be a sufficient compliance with the requirement of the statute. *Daily Pantagraph* v. *United States*, 37 F. (2d) 783, 788–789 (C. Cls.); *Connell* v. *Hopkins*, 43 F. (2d) 773, 776 (N. D. Tex.). Cf. *McKeeson & Robbins, Inc.*, v. *Edwards*, 38 F. (2d) 887, 888 (S. D. N. Y.).

While the practice outlined above was in effect Congress reenacted Section 3226 of the Revised Statutes, as amended, in the Revenue Act of 1924, and again in the Revenue Act of 1926. This reenactment shows congressional approval of the practice adopted by the Treasury Department. *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361, 401–402. So uniform was the practice of the Treasury Department in this respect that we are informed by the Treasury Department that there are now outstanding 172,969 claims involving $2,017,716,241.52, which were rejected between January 1, 1922, and August 31, 1928, without notice having been given after the formal rejection of the claim for refund.

CONCLUSION

It is submitted that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA, Petitioner, v. THEODORE MICHEL, Respondent.	Nos. ~~812-813~~ 79+80
UNITED STATES OF AMERICA, Petitioner, v. LOUIS KRIEGER, Respondent.	

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA, Petitioner, v. THEODORE MICHEL, Respondent.	Nos. 812, 813.
UNITED STATES OF AMERICA, Petitioner, v. LOUIS KRIEGER, Respondent.	

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Statement.

The Attorney General petitions for writs of certiorari from judgments of the Circuit Court of Appeals for the Second Circuit reversing the District Court and holding that the actions were not barred by the statute of limitations.

These are suits to recover income taxes erroneously collected for 1919. The taxes were paid more than five years before suit was brought. Refund claims were timely filed.

By letter dated August 17, 1925, the Commissioner notified respondent Michel that his claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him. Respondent Michel heard no more concerning the action on his claim until he received a letter from the Commissioner dated June 27, 1928, notifying him that the claim had been rejected on September 2, 1925. By letter dated April 2, 1925, the Commissioner notified respondent Krieger that his claim would be rejected and the rejection would officially appear on the next schedule to be approved by him. Respondent Krieger heard no more concerning the action on his claim until he received a letter from the Commissioner dated June 27, 1928, notifying him that the claim had been rejected on April 20, 1925.

The District Court in each case dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and entered judgment accordingly. The Court rendered no opinion.

The Circuit Court of Appeals reversed these judgments, holding that, since no notice of rejection had been mailed after the rejection, as required by Section 3226, Revised Statutes, as amended, or until June 27, 1928, more than two years after the date of rejection relied upon by petitioner, no statute of limitations had run on the bringing of suit in these cases at the time they were begun in September, 1928. The opinion of the Circuit Court of Appeals is reported in 37 Fed. (2nd) 38.

Question Presented.

Can the Government be heard to urge the defense of the statute of limitations in a suit to recover taxes brought more than two years after the rejection of a claim for refund, where the Commissioner of Internal Revenue failed to notify the taxpayer of such rejection by mail, as required by Section 3226 of the Revised Statutes, as amended, or until more than two years after such rejection had expired?

Statute Involved.

The statutory provisions involved have been correctly and fully quoted by the Attorney General in his brief. The pertinent part of Section 3226 of the Revised Statutes, as amended by Section 1014, Revenue Act of 1924, and re-enacted by Section 1113, Revenue Act of 1926, reads:

> "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Argument.

The question in each case is the effect of the provision constituting the last sentence of Section 3226 of the Revised Statutes, as amended, that the Commissioner shall, within ninety days *after* the disallowance of any claim for refund, notify the taxpayer thereof by mail. The Circuit Court of Appeals for the Second Circuit has held that this provision was mandatory, and that, where it was not complied with within two years, the statutory provision limiting the time for bringing suits to two years after the rejection of claims for refund did not bar the suits.

It is certainly reasonable that a taxpayer should be advised of a date which marks the beginning of the running of a statutory period of limitation which may be used against him. Congress evidently considered it necessary for his protection that he be so advised within a reasonable length of time, which it fixed at ninety days after the occurrence of the date.

It is difficult to conceive a purpose for the insertion of the provision other than the protection of the taxpayer's rights. It was of so little importance to the executive officials in the administration of the tax laws that, as the Attorney General has stated in his petitions for certiorari in the instant cases (p. 4), the Treasury Department has disregarded it in thousands of cases. It was not designed for the convenience of administrative officials or to secure order, system or dispatch in proceedings. Its observance would have accomplished none of these things. Its sole purpose was to advise taxpayers when their actions would become barred.

The rule in such cases was stated by this Court, in an opinion rendered by Mr. Justice Field in *French* v. *Edwards*, 13 Wall. 506, 511, to be that such a provision, enacted for the protection of citizens, is *mandatory*. This Court said:

> "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The position of the Attorney General must necessarily be that the Commissioner of Internal Revenue can disregard this statutory mandate at will, and yet take advantage of the statute of limitations as if he had complied with it.

There is a fundamental rule of law that where a statute, by a mandatory provision, requires the giving of notice, compliance with such provision in all essential particulars is a condition precedent to any further proceedings. In *Cooley on Taxation*, Third Edition, pages 484, 485, it is said:

> "So all the provisions designed to give him (the taxpayer) the opportunity of a review of the assess-

> ment, whether by the assessors themselves, or on appeal from their conclusions, are exclusively in his interest. Every notice which the statute provides for that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites. The notice cannot be shortened a single day without rendering it ineffectual; the presumption being that the law has made it as short as was deemed consistent with due protection. A published notice cannot be received as the substitute for a notice to be personally delivered to the party concerned, and where the notice is to be given personally and also by publication, a failure in either is fatal."

We submit that the Commissioner, having failed to give the notice to the taxpayers of the dates of rejection of their claims for refund, cannot now set up the statute of limitations to the taxpayers' prejudice.

This Court recently had before it another instance of disregard by the Commissioner of Internal Revenue of a mandatory provision of law. The Commissioner collected taxes after the time prescribed for their collection, and in this he was protected by Section 3224 of the Revised Statutes, which prohibited a suit to enjoin the collection of taxes under any circumstances. But when he refused to refund the taxes thus illegally collected, on the ground that they were the correct taxes due, and should be retained even though the collection was made in an illegal and prohibited manner, this Court refused to sustain him, and gave judgment for their repayment to the taxpayers. The violation by the Commissioner of the provision limiting the period for collection prevented all further proceedings by him, including a defense on the ground of the correctness of the taxes collected, where the taxpayer brought suit for their recovery on the sole ground of illegality in their collection (*Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Toxaway Mills* v. *U. S.*, 273 U. S. 781). The question at issue in that case also involved thousands of similar claims aggregating many

millions of dollars, but this Court did not let that consideration influence it to approve wholesale violation of a statutory provision by the administrative officials to the prejudice of taxpayers' rights.

The Attorney General relies on the fact that some time before the actual rejection of the claims for refund the Commissioner notified the taxpayers that their claims would be rejected, and that the rejection would officially appear on the next schedule to be signed by the Commissioner. He says:

> "They had therefore actual notice that their claims would be denied and the general object intended by the notice provision of the statute was secured."

They had, however, no actual notice of the rejection, or the date thereof, but only of the Commissioner's intention, which was subject to change at any time up to the rendering of his official decision. Notice of his intention did not secure the object of the notice provision, which was to advise taxpayers when the statutory period of limitation began to run. The statute provided that the notice should be given *after* the rejection when the exact date of the rejection would be definitely known. Even at the time this notice provision was first enacted it was the custom of the Commissioner to advise taxpayers of his intention to reject their claims before he actually rejected them. It is hardly likely that Congress intended to instruct him to do something that he was already in the habit of doing. The fact that this custom was in vogue at the time the provision for notice was enacted shows that Congress was not satisfied with it, and required something more for the protection of taxpayers.

The notice required by the statute was the only means by which taxpayers could learn the dates upon which their claims were rejected and the limitation period began to run. The schedule of rejected claims, the signing of which by the Commissioner constitutes his official act of decision

on and rejection of the claims, is an interdepartmental document not furnished to or available to the taxpayer.

The notices of intention to reject the taxpayers' claims did not constitute actual notice of their rejection, for the claims had not yet been rejected. As stated by the Attorney General in his petition, the notices of intention to reject were dated August 17, 1925, in the Michel case and April 2, 1925, in the Krieger case. The actual rejections were on September 2, 1925, and April 20, 1925. The only notices of rejection, stating the dates thereof, were given on June 27, 1928, more than two years after the rejection dates.

The time for bringing suit does not run from the Commissioner's notice of intention to reject a claim at a future date. The statute says "within two years after the disallowance." The Attorney General agrees that "the disallowance of a claim for refund takes place when the schedule is approved by the Commissioner" (Brief, p. 9), and the Commissioner himself says in his letters of June 27, 1928, that the disallowances occurred on September 2, 1925, and April 20, 1925, respectively, and not on August 17, 1925, and April 2, 1925, the dates of the letters stating his intention to reject at a future time.

As stated by the Circuit Court of Appeals, the notices of intention to reject were not rejections or final decisions on the claims. At any time up to the date of signing the schedule in such cases he might change his intention, due to some new Court decision, Board of Tax Appeals decision, or change in his own interpretation of the law or facts. He might not agree with the conclusion reached by his subordinates, who in all cases sent out the notice of intention letter, and who could not themselves reject a claim, but merely recommend to him that he reject it. It has happened in many cases that letters of intention to reject were mailed, but that the claims were never rejected. It has also happened in many cases that the Commissioner has reconsidered his intention to reject and later arrived at the same conclusion, but such reconsideration has postponed the date of rejection.

Recapitulation.

The claims for refund were rejected more than two years before these actions were commenced, but the notice of rejection required by law, and necessary to render the statute of limitations an available defense, were not given until just before these actions were begun. These actions were therefore not barred. It is not necessary to decide what would be the effect of a notice, given after the statutory ninety days, but before the expiration of the two-year period. In the instant cases the notices were not given until the two-year period had expired. Respondents were certainly entitled to notice of the date on which the two-year period would expire in time to enable them to bring their actions before that date. The Commissioner failed to take one of the steps required by law to foreclose respondents from bringing their actions more than two years after the rejection of their claims.

Reasons Why the Writs Should Be Denied.

1. The provision for notice is obviously mandatory.

2. The provision for notice is clear and unambiguous.

3. Even though the decision of the Circuit Court of Appeals is far-reaching and affects many cases, it merely follows the plain words and intention of the statute and insists upon compliance therewith.

4. It is urged on behalf of the writ that the construction of the statute by the Court below, if sustained, would result in the reopening of many claims involving two billions of dollars. That argument is not addressed to the question of the proper construction of the statute, but as to the practical operation of the proper construction and the argument should be made to the Congress and not to the Court.

5. There is no conflict of decisions on the question involved. The question of required notice of rejection was considered in only one case cited by the Attorney General, and in that case the decision was in favor of the taxpayer (*Mahoning Coal R. Co.* v. *United States* [N. D. Ohio], 28 Fed. [2nd] 917). The Government took no appeal in that case.

Neither the District Court, in dismissing the complaints, nor the dissenting judge in the Circuit Court of Appeals, rendered any opinion.

6. The fact that this point has not been raised or argued in any other case, save the one above mentioned, indicates that it is not so important as the Attorney General states, and that it probably does not affect many cases or cases involving the possibility of large refunds. As to this, however, respondents have no definite information.

Conclusion.

It is respectfuly submitted that the petition for writs of certiorari should be denied.

Respectfully,

DONALD HORNE,
Attorney for Respondents,
Chrysler Building,
New York City.

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Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA, *Petitioner,* v. THEODORE MICHEL, *Respondent.*	No. 79.
UNITED STATES OF AMERICA, *Petitioner,* v. LOUIS KRIEGER, *Respondent.*	No. 80.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1480.

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Supreme Court of the United States

OCTOBER TERM, 1930.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinion Below.

The District Court for the Southern District of New York rendered no opinion. The opinion of the Circuit Court of Appeals (R. 7-11, 17-21) is reported in 37 F. (2d) 38.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered January 14, 1930 (R. 11, 21). The petition for writs of certiorari was filed April 12, 1930, and the writs were granted on May 19, 1930 (R. 22). Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Can the Government be heard to urge the defense of the statute of limitations in a suit to recover taxes brought more than two years after the rejection of a claim for refund, where the Commissioner of Internal Revenue failed to notify the taxpayer of such rejection by mail, as required by Section 3226 of the Revised Statutes, as amended, or until more than two years after such rejection had expired?

Statute Involved.

The Revenue Act of 1926, Chap. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156), provides in part:

> "Sec. 1113(a). Section 3226 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> 'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established

in pursuance thereof, but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

Statement.

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes paid for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory (R. 1-3, 11-14). In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but notification to the taxpayer that the claim had been officially rejected was not given until more than two years after the disallowance.

In the *Michel* case the complaint alleged: The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15 and December 15 of that year; a claim for refund of a portion of the tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him (R. 1);

the claim was so rejected by the Commissioner on September 2, 1925 (R. 2); and under the date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection (R. 1). Action in the District Court to recover the tax was begun subsequent to September 26, 1928 (R. 7).

In the *Krieger* case the complaint alleged (R. 12): The taxpayer's return for 1919 was filed on March 15, 1920, and the tax shown to be due thereon was paid in four instalments on March 15, June 15, September 15 and December 15, 1920; a claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; the claim was so rejected by the Commissioner on April 20, 1925; and under date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection. Action in the District Court was begun subsequent to September 26, 1928 (R. 8).

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint (R. 4-5, 15). On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding that although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run, because the statutory notification that the claims had been rejected was not given within two years after the rejection. One judge dissented without filing an opinion.

Argument.

Section 3226 of the Revised Statutes, as amended, provides that suit to recover overpayments of tax may not be begun more than five years after the payment of the tax, unless begun within two years after the disallowance of

the claim, and that the Commissioner *shall within ninety days after any such disallowance notify the taxpayer thereof by mail.* In the instant cases the Commissioner failed to give such notice after the disallowance until the two-year period had expired. The Circuit Court of Appeals held that the statute of limitations did not begin to run, and that respondents' actions were begun in time.

The Circuit Court of Appeals said that the words in the statute directing notice were "primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute"; that "the taxpayer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail"; that "*notice of the Commissioner's action is required by all the necessities of the case*"; that the letters from the Commissioner advising respondents that their claims "would be rejected" were not sufficient notices to comply with the law, since the statute prescribes a notice "after" the disallowance; that the word "after" is not merely technical, but goes to the essence; that "it requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophesy of the Commissioner—a prophesy subject to a possible change of the latter's opinion"; that "the rejection appearing on the schedule approved by the Commissioner, and not the letter forecasting his action, represented his final decision as a matter of law"; that "the provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run"; that "by no other construction can its mandatory provision be given effect, and its various provisions be made congruous"; that "the statute does not bar the rights of taxpayers for failure to exercise due diligence, but only after such notice is given and such time has elapsed as the act prescribes." The Court quoted from *French* v. *Edwards,* 13 Wall. 506, 511, to show that the provision prescribing notice is mandatory.

The Attorney General argues:

> 1. That the period of the statute of limitations is started by the rejection of the claim, and not by the notice.
>
> 2. That the legislative history indicates that the limitation period begins when the claim is rejected, and fails to disclose any intention on the part of Congress that the period should be extended by the failure of the Commissioner to give the notice.
>
> 3. That the requirement that notice be given was substantially complied with.

The substance of these contentions is that the provision reading:

> "The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail"

is merely directory, and that the Commissioner may disregard it if it does not suit his convenience to comply with it.

It is obvious that this provision was not inserted in the statute for administrative convenience, or to secure order, system or dispatch in proceedings. Its observance would not accomplish any of these things. Its object was to acquaint taxpayers with the time in which they may bring suit. It was to enable taxpayers to protect their rights.

Respondents had no means of knowing when their time to bring suit would elapse in the absence of the required notice. There was no other provision for communication to them of the dates when their claims were rejected. The official act of rejection was entirely intradepartmental. It was communicated by the Commissioner to the Collector, and there was no provision whereby the Collector was authorized or directed to advise the taxpayer, and he did not do so. It was the function of the Commissioner, not the Collector, to pass upon claims for refund, and the

statute specifically placed upon the Commissioner the duty of advising claimants of his action, in writing, *after* he had taken it. This duty is so reasonable and necessary for the protection of the rights of taxpayers that it would seem it should be required, as a condition precedent to the defense of the statute of limitation, even if there were no specific statutory provision.

In these cases the rejection of the taxpayers' claims was not only *not* made a public record open to their inspection, but was a fact not ascertainable by them until notice was given to them by the Commissioner. There is no place here for the doctrine of constructive notice. For this reason the law places the burden upon the Commissioner of giving actual notice by mail of what he has done, not of what he intends to do. The only step which the taxpayers could have taken would have been to make inquiries of the Commissioner. The statute absolves them from any duty in this respect. It does not contemplate that the taxpayers shall be put to the burden of making repeated inquiries in order to determine and protect their right to bring suit. Congress recognized that an undisclosed rejection would not be sufficient to start the statute of limitations, yet desired to measure the period thereof from the official act of rejection. It therefore provided specifically that the Commissioner shall give notice of such rejection within a reasonable time thereafter, and fixed that reasonable time at ninety days. Respondents had a right to rely upon the notice thus provided for. Having been led to believe, by this peremptory provision of the statute, that they would be duly and promptly notified by mail when their claims were rejected, they cannot now be fairly criticized or made to suffer for failure to make inquiries.

Statutory provisions are of two kinds, directory and mandatory. Both are, of course, intended to be complied with; but the consequences of non-compliance are not so serious in the one class as in the other. Where no rights depend upon compliance with a provision, it is classified as "directory," but where rights depend upon compliance, the provision is considered mandatory. Failure to comply

in such a case is equivalent to taking property contrary to law. Consequently, where non-compliance with a provision of a statute operates to deprive a person of a right or benefit intended to be secured by it, the courts consistently refuse to permit such deprivation and consider all proceedings in derogation of such right or benefit to be null and void.

Where a statute creates or secures to citizens certain rights or benefits, the courts will enforce such provisions. This is elementary. Consequently, they will not permit administrative officials, either by *act* or *omission*, to violate such rights or benefits.

The general doctrine was perhaps best stated by Mr. Justice Field in *French* v. *Edwards*, 13 Wall. 506, 511, as follows:

> "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The Attorney General seeks to distinguish this case from the cases at bar as follows:

> "The court below relied on French v. Edwards, 13 Wall. 506. We submit that this decision is clearly distinguishable from the instant case on its facts. French v. Edwards involved the validity of a tax deed. It appeared that the statutes of California provided that the sheriff in selling property 'shall only sell the smallest quantity that any purchaser will take and pay the judgment and all costs.' This Court held that the failure of the sheriff to comply with this statutory provision made the tax deed invalid. This was simply an application of the familiar rule that before a person can be divested of his property without his consent, all the

> statutory requirements must be strictly complied with. But the decision has no bearing on the question when the period of the Statute of Limitations begins to run. The statute involved in French v. Edwards operated to deprive a person of his property, while the statute involved in the instant case operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before."

Respondents submit that failure to notify them when the statute began to run deprived them of a right secured to them by express provision of the statute, just as failure by the sheriff to sell the smallest quantity of property necessary to pay a judgment deprived the judgment-debtor of a right secured to him by express provision of the statute. In the latter case the non-compliance invalidated the tax deed, there being no other possible remedy for the wrong caused by it. In the instant cases the only possible remedy for the wrong caused by non-compliance with the statutory provision is a decision that the statute of limitations did not begin to run.

The Attorney General says that the statute involved in the instant cases operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before. It is submitted that this statement is in error. Section 3226 of the Revised Statutes, as amended, does not confer a privilege of suing the United States, but merely states certain conditions and limitations on the maintenance of tax suits, whether brought against the United States or as personal actions against the Collector who collected the taxes. The consent to sue the United States was given in another law, to wit: Paragraph Twentieth of Section 24 of the Judicial Code as amended by Section 1122(b) of the Revenue Act of 1926. The provisions of Section 3226 of the Revised Statutes, as amended, apply equally to *common law suits* against the Collector who collected the taxes, which are the only suits allowed where such Collector is still in office and the claim exceeds $10,000. So the instant cases cannot be distin-

guished from *French* v. *Edwards*, *supra*, on the ground that the statute involved here confers the privilege of suing the sovereign. But even if it did, such distinction would not be sound. The privilege of suing the sovereign is a privilege only as between the sovereign and the taxpayer. Only Congress can revoke it. *Schillinger* v. *U. S.*, 155 U. S. 163; *Price* v. *U. S.*, 174 U. S. 373. It is not within the province of any executive or administrative official, or of any court, to withdraw the privilege by failure to comply with statutory provisions in regard thereto. The statute involved in *French* v. *Edwards*, *supra*, operated to prevent deprivation of property by selling a greater amount than necessary to pay a judgment debt. The statute involved in the instant cases operated to prevent deprivation of a benefit (whether right or privilege) created by Congress in any degree by failure to notify taxpayers when that right (or privilege) would elapse.

The Attorney General argues that statutes concerning the consent of the Government to be sued must be strictly construed in favor of the Government, especially as to the time for bringing suit. Respondents agree that the statute under consideration should be strictly construed, but insist that the entire section be construed, and that no part of it be disregarded. There is no question in this case of strict or liberal construction. Respondent's contention is that an important part of the statute under construction is being ignored as if non-existent in the Attorney General's brief.

The Attorney General further argues that if the notice provision be construed as a condition precedent to the running of the time for bringing suit against the Government, it follows that the Government has waived its right not to be bound by the negligence or default of its administrative officers. It is presumed that he means that the notice provision, construed as such condition precedent, would have the effect of a waiver of the Government's right not to be bound by failure to give notice through negligence. But this does not follow. Where a statute provides that a certain provision shall become operative

upon the performance of a specified act, the provision becomes operative when the required act is performed, and not before. This is not due to waiver, but to a positive direction of the statute. The notice provision must be given that effect in the section under consideration or read out of the law. It is submitted that the Government cannot take advantage of a statutory provision in its behalf without doing the things prescribed by that statutory provision as necessary to put it into operation. It is also submitted that this was the intention of Congress. It did not intend that the statute of limitations should run without timely notice to the taxpayers of the date from which it would be measured, so that they could determine accurately the expiration date. Otherwise there was no reason at all for the enactment of the notice provision.

Other cases which have followed the doctrine of *French* v. *Edwards*, as announced in the above quotation, are *Lyon* v. *Alley*, 130 U. S. 177; *Logan* v. *U. S.*, 144 U. S. 263; *Bowen* v. *Minneapolis*, 47 Minn. 115, 49 N. W. 683.

In statutory proceedings every act which is jurisdictional or of the essence of the proceeding or prescribed for the benefit of the party affected is mandatory. *Gallup* v. *Smith*, 59 Conn. 354, 22 Atl. 334.

Although the words of a statute are merely permissive, directory, or enabling, they may nevertheless have the force of words of command where the power or duty to which they relate is for the advancement of public justice or the security and protection of public or private rights. *State* v. *Haworth*, 122 Ind. 462, 23 N. E. 946; *State* v. *Kent*, 4 N. D. 577, 62 N. W. 631. The words "may," "shall be lawful," and the like, frequently are to be construed as "shall" or "must," where the rights of the public or of third persons depend on the exercise of the power, or the performance of the duty, to which the statute refers. *U. S.* v. *Thoman*, 156 U. S. 353; *Ex parte Simonton*, 9 Port. (Ala.) 390, 33 Am. Dec. 320; *Stackpole* v. *Hallahan*, 16 Mont. 40, 40 Pac. 80; *Kennelly* v. *Jersey City*, 57 N. J. L. 293, 30 Atl. 531; *People* v. *Brooks*, 1 Denio (N. Y.) 457, 43 Am. Dec. 704; *State* v. *Kent*, 4 N. D. 577, 62 N. W. 631.

The word "shall" in a statute may not be construed as "may" if any right to anyone depends on giving the word an imperative construction. The presumption is that the word was used in reference to such right or benefit. *Wheeler* v. *Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Stackpole* v. *Hallahan*, 16 Mont. 40, 40 Pac. 80. "Shall" ought to be construed as meaning "must" for the purpose of sustaining or enforcing an existing right. *West Wisconsin R. Co.* v. *Foley*, 94 U. S. 100.

In the instant cases the provision under consideration uses the word "shall." It provides that "the Commissioner shall within 90 days * * * notify the taxpayer thereof by mail." This is mandatory language. It is in the form of a command, and is not in the form of a grant of discretionary power. The presumption is that the word "shall" means "shall," and it should be so construed unless an intention to the contrary is clearly indicated by the context. But when the word "shall" is read with the following three words, "within 90 days," the idea of conferring discretion is entirely excluded. There would be no object in authorizing the Commissioner, in his discretion, to notify the taxpayer within ninety days. Why the specification of ninety days, if the whole matter were within the discretion of the Commissioner, and he were not required to send the notice at all, if in his judgment such procedure was too laborious or expensive? In any event, he already had full authority to notify the taxpayer in the ordinary course of his administration of the tax laws. *The only reasonable object and purpose of the provision was to prevent the Commissioner from failing to notify the taxpayer.*

It is true that the statute expressly provides that no suit may be brought after five years from payment of the tax, unless brought within two years after the disallowance of the claim for refund. But it is also true that Congress expected its mandate as to notice to be carried out, and dated the two-year period from the rejection of the claim for refund on the assumption that due notice

of the rejection would be given. Congress predicated the invariability of the first provision upon the invariability of the second. That is, it intended the limitation period to begin to run when all acts required to put the limitation provision into effect, including the notice by mail *after* the rejection, had been done, and to expire two years after the date of rejection of which the taxpayer was notified. It did not intend to catch the taxpayer in a trap, by starting a limitation period of which the taxpayer had no notice and no means of knowledge, and lulling him into a sense of security by providing for a notice upon which he had a right to rely, but which it intended the Commissioner not to send if he considered it to the best interests of the revenue not to send it. This would constitute misleading the taxpayer in order to retain overpayments of taxes, and such motives should not be imputed to Congress. Yet it is the inevitable result of the interpretation which the Attorney General seeks to place upon Section 3226 of the Revised Statutes, as amended.

A cardinal rule of statutory construction aids us at this point, which is, that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act. *Adams* v. *Woods*, 2 U. S. (L. Ed.) 296; *U. S.* v. *Wiltberger*, 5 U. S. (L. Ed.) 37; *U. S.* v. *Howell*, 20 U. S. (L. Ed.) 195; *Alten* v. *Louisiana*, 103 U. S. 80; *Montclair* v. *Ramsdell*, 107 U. S. 147; *U. S.* v. *Oregon R. Co.*, 164 U. S. 526; 25 R C. L. 1004, Note 16. If the Attorney General's contention is correct, the provision for notice by mail within ninety days after rejection is a nullity, and he admits and states that the Commissioner has so treated it by ignoring it in thousands of cases. But it is not to be presumed that Congress enacted this provision for no purpose. It must be given effect.

The corollary of the above-stated cardinal rule of construction is that the several provisions of the statute should be construed together in the light of the general purpose and object of the act so as to give effect to the main intent and purpose of the legislature as therein expressed. *Pennington* v. *Coxe*, 2 Cranch. 33, 2 U. S.

(L. Ed.) 199; *U. S.* v. *Fisher*, 2 U. S. (L. Ed.) 304; *Postmaster* v. *Early*, 6 U. S. (L. Ed.) 577; *Pollard* v. *Bailey*, 22 U. S. (L. Ed.) 376; *U. S.* v. *Moore*, 95 U. S. 762; *U. S.* v. *Burr*, 159 U. S. 78; *The Delaware*, 161 U. S. 459; *U. S.* v. *Ninety-Nine Diamonds*, 139 Fed. 961; 25 R. C. L. 1008. If different portions of the statute seem to conflict, they should, if practicable, be harmonized, that construction being favored which will render every word operative rather than one which makes some words idle and nugatory. *Calhoun Gold Mine Co.* v. *Ajax Gold Mine Co.*, 27 Colo. 1; *Cory* v. *Carter*, 48 Ind. 337; *State* v. *Bartholomew*, 176 Ind. 182; *Young* v. *Regents of University*, 87 Kan. 239.

A further rule of construction is that an absurd result will be avoided if an interpretation can be found which will be reasonable. 25 R. C. L. 1019; *The Paulina* v. *U. S.*, 3 U. S. (L. Ed.) 266; *Fleckner* v. *U. S. Bank*, 5 U. S. (L. Ed.) 631; *Murdock* v. *Memphis*, 22 U. S. (L. Ed.) 429; *Shaw* v. *North Pennsylvania R. Co.*, 101 U. S. 557; *Chew Heong* v. *U. S.*, 112 U. S. 536; *Glover* v. *U. S.*, 164 U. S. 294. It is not considered necessary to cite the many cases supporting these three principles of statutory construction, which are not only thoroughly established, but are based on common sense.

Applying these principles to Section 3226 of the Revised Statutes, we find that unless the provision for notice be held mandatory, the statute would have an absurd result, for it would start a limitation period running against the taxpayer, which would elapse and expire without his knowing that it had started to run, and without his having the means of obtaining such information. It would have an important provision rendered nugatory, unenforceable, and of no effect whatever. But if that provision be held mandatory, the reasonable and salutory object of the entire statute would be effected. The section provides for a right of taxpayers to sue for refund of overpayments of taxes within a specified time, and provides for notice to the taxpayers of the time so allotted, so that they may be enabled to avail themselves of it.

The two parts of the statute are capable of being construed harmoniously together. The limitation provisions do not start to operate until the required notice is given, and then, when they do take effect, continue until the expiration of two years from the date of a past event concerning which notice was given.

We can give an instance where a statute of limitations began to run three years after the date from which it was measured for a five-year period, and ran the remaining two years to the expiration of the five-year period. Section 250(d) of the Revenue Act of 1921 provided that income and profits taxes for 1917 must be determined, assessed and collected within five years after the returns were filed. Returns for 1917 were filed normally on March 1, 1918. The Revenue Act of 1921 was enacted November 23, 1921. It is clear that the five-year limitation provision did not take effect and begin to operate until November 23, 1921. Three and one-half years of the five-year period had expired before the limitation provision came into existence. But it then became and remained operative until the five-year period expired on March 1, 1923.

It is obvious that the running of this statute of limitations was not started by the filing of the return in 1918. It was started by the enactment of the Revenue Act of 1921 on November 23, 1921, and ran from that date until March 1, 1923, not from March 1, 1918, to March 1, 1923.

It is immaterial that the date from which the limitation period is measured is in the past at the time the statute of limitations takes effect, if the expiration date is in the future.

So, under Section 3226 of the Revised Statutes, as amended, giving effect to all the provisions of that section, the statute of limitations starts to run when the Commissioner notifies the taxpayer by mail of the rejection of his claim for refund, within ninety days after such rejection, and expires two years after the date of rejection. But if the statutory notice is not mailed, respondents contend that the statute of limitations does not start to run. The

lapsing of the two-year period from rejection is of no effect where the statute of limitations was not put into operation by the performance of a necessary condition to such operation.

Consequently, the Attorney General's first argument is, respondents submit, basically erroneous. He says that the statute of limitations is put into operation by the rejection of a claim for refund. Such rejection necessarily occurs before the final act required by the statute to put the statute of limitations into operation, which is the mailing of a notice to the taxpayer *after* the rejection, advising him thereof. Respondents submit that, giving effect to the provision requiring notice of rejection within ninety days after rejection, the statute of limitations is put into operation by the mailing of such notice, and runs from that time until two years from the date of rejection, and that where such notice is not given the statute of limitations does not begin to run.

The legislative history is consistent with respondent's construction. One very important element of the legislative history of Section 3226 of the Revised Statutes, which the Attorney General fails to mention, is that the provision for notice of rejection within ninety days after such rejection was enacted at the same time and as a part of the provision allowing two years after rejection within which to bring suit. The two provisions were enacted contemporaneously as part of the same section and were obviously intended to be correlative. Although the reports of the Finance Committee and the Conference Report make no reference to the requirement of notice, it is evident that what they did say was subject to the understood condition that notice be sent as provided, because the notice requirement is part of the section under discussion. The following language, quoted by the Attorney General on page 12 of his brief from the report of the Finance Committee, is significant:

> "If the section be amended, as above suggested, the taxpayer will not have to start any suit until it has been definitely determined that the Bureau has disallowed his claim."

The taxpayer cannot definitely determine that the Bureau has disallowed his claim until the Bureau notifies him that it has disallowed it. That is the reason for the provision requiring notice by mail *after* such disallowance. The language quoted certainly contemplates notice of some sort, and manifestly the notice contemplated was that specifically provided for in the bill which was being reported on.

The Attorney General can derive little aid from the legislative history. There is nothing in it inconsistent with the notice provision, and nothing in it which indicates that it was not intended to be complied with. The absence of any mention of the notice provision in the reports of committees indicates rather that its language was so clear, specific and absolute that no report upon it was necessary. And, as above shown, the Finance Committee Report quoted by the Attorney General and above quoted in this brief contemplated that the taxpayer would not have to bring any suit until notified that the Bureau had disallowed his claim.

The third argument of the Attorney General is that the notice requirement was substantially complied with. This is an attempt to justify what he recites as the practice of the Bureau of Internal Revenue, although the facts regarding such practice are not to be found in the record, and appear only in statements in the Attorney General's brief. Respondents are not willing to concede that these statements are correct. We do not know what occurred with respect to other claims, and should not be bound or prejudiced by anything the Attorney General has said in that regard. What has happened with respect to other claims has nothing to do with the correct determination of the cases at bar. The matters stated by the Attorney General are subject to proof, if material, and cannot properly be brought before the Court by mere statements of counsel. This applies to the statement that there are now outstanding 172,969 claims involving $2,017,716,241.52, as to which no notice of rejection has been given. Respondents deny

this statement. This denial is based upon nothing at all, but is entitled to just as much weight as the Attorney General's assertion, since neither is in the record or properly brought to the attention of this Court as a fact.

The Attorney General's statistics, ostensibly given to show the uniformity of the Bureau's practice—which itself is not properly presented to this Court as a fact—is also probably intended to arouse apprehension in the mind of this Court as to the vast number of claims, supposed to be closed, which would be open for suit if the decision of the Circuit Court of Appeals in the instant cases is sustained. This line of argument is not only improper because based upon alleged facts not in the record, and immaterial, because volume of violations of a statute is no argument as to its proper construction, but is made on lump sum statistics which do not tell the full truth. The Attorney General does not show how many of the claims rejected without the statutory notice have been foreclosed forever by statutory "closing agreements"; Section 1006, Revenue Act of 1924; Section 1106(b), Revenue Act of 1926; Section 606, Revenue Act of 1928; or by compromises, or by final decisions of the Board of Tax Appeals, or how many of these claims are based upon legal questions which have been determined by this Court adversely to the taxpayers' contentions. The great majority of the claims mentioned are probably dead claims. The Attorney General has failed to state, among his *off-the-record* facts, that it has also been the uniform practice of the Bureau of Internal Revenue to solicit closing agreements from every taxpayer; and he has also failed to mention the vast number of duplicate claims, that is, claims covering the same years and subject-matter. Even if it could be conceived that a large number of suits could be brought by reason of the failure to send notices of rejection, the right to refund would have to be established by proof of facts and law. If the volume of claims that might be affected by this case is material, respondents claim the right of cross-examination as to the facts recited, and the right to introduce evidence in rebuttal and explanation.

For the reasons stated, respondents submit that no weight whatever should be given to the recital of facts contained in the third argument in the Attorney General's brief, except as to what was done in the instant cases.

The third argument of the Attorney General is thus reduced to three sentences on pages 13 and 14 of his brief, reading as follows:

> "* * * notice was sent to each respondent advising him that his 'claim for refund would be rejected and that this rejection would officially appear on the next schedule to be approved by' the Commissioner (R. 1, 12). The approval of the schedule occurred less than three weeks after the mailing of the notice. The giving of a notice in that form shortly before the rejection appeared on the official schedule has been held to be a sufficient compliance with the requirements of the statute."

The notice referred to was a letter sent to respondent Michel on August 17, 1925, and his claim was rejected on September 2, 1925; to respondent Krieger on April 2, 1925, and his claim was rejected on April 20, 1925 (R. 1, 2, 12). These letters, if considered as notices, referred to a contemplated act to be done at an indefinite future date, whereas the statute required a notice *after* the act of rejection stating when it was done. The notice provision would be out of place in Section 3226 of the Revised Statutes, as amended, except for its relation to the statute of limitations on bringing suits, as that is the subject-matter of the section. The word "thereof" in the phrase "shall * * * notify the taxpayer thereof by mail" refers to the consummation of the rejection, but principally to the time of such consummation.

The cases cited by the Attorney General as holding that the letters before rejection were sufficient compliance with the notice requirement are not in point. In *Daily Pantagraph* v. *U. S.*, 37 Fed. (2nd) 783, 788, 789, the claims had never been rejected, but suit was brought more than six months after they were filed. The stipulation clearly shows these facts. The Commissioner in that case urged

his own default in passing on the claims as a defense. The question as to *sufficient notice after rejection* was not involved. In *Connell* v. *Hopkins*, 43 Fed. (2nd) 773, 776, the question was whether a *claim for refund* was filed in time, and the question whether sufficient notice was given under Section 3226 of the Revised Statutes, as amended, was not involved. *McKesson & Robbins, Inc.* v. *Edwards*, 38 Fed. (2nd) 887, 888, is pending on appeal. The notice provision in Section 3226 had not been called to the attention of the District Court when it rendered its decision and there was nothing before the Court to show that the notice of rejection had not been given.

The two-year period runs from the actual dates of rejection and not from the dates of advice as to the Commissioner's contemplated future action. At the time the letters of August 17, 1925, and April 2, 1925, were sent, the claims had not yet been rejected. This is a given fact in these cases, the allegations in the complaints to this effect being based on the Commissioner's statement in his letters to respondents of June 27, 1928 (R. 1, 12). It is a fact determined in accordance with the practice of the Bureau of Internal Revenue and the law as stated by this Court. A statement by the Commissioner, as was made in these cases, that he intends, in the future, to disallow a claim, by a contemplated future official act requiring his approval, is not the rendition of a decision by him, and does not constitute the disallowance of the claim. If it did it would follow that a similar statement of his intention to allow a claim in part and reject it in part would constitute the rendition of his decision to allow the claim in part and reject it in part; but this would be contrary to the decision of this Court in *Girard Trust Co.* v. *U. S.*, 270 U. S. 163, in which it was held that the claim for refund was allowed in part at the time the Commissioner approved and signed the schedule returned by the Collector showing the state of his account with the taxpayer. Under this decision the Commissioner's letter to the taxpayer stating his intention to allow the claim in part and to reject it in part

did not constitute either the rendition of his decision or the allowance or disallowance of the respective parts of the claim; for the official act of approving the schedule was held to constitute the allowance of the part of the claim allowed, and, consequently, the disallowance of the other part.

There is no statutory provision requiring the sending of letters of intention to allow or reject claims, but only Bureau practice and courtesy. There is no set time, after the sending of such letters, for the actual rejection, but such rejection occurs at the convenience of the Commissioner and the Bureau.

The statute distinctly requires notice of disallowance *after* the disallowance. This undoubtedly refers to the official rejection which constitutes the final decision of the Commissioner. The statute uses the word "disallowance," which is the opposite of "allowance." This Court held, in *Girard Trust Co.* v. *U. S.*, *supra*, that the "allowance" or partial "allowance" of a claim occurs when the schedule is delivered to the Commissioner and made effective by his approval. It follows that the partial "disallowance" or entire "disallowance" also occurs when the schedule is officially approved by the Commissioner.

The word "after" is of great importance, because it is only "after" the rejection that the Commissioner can state definitely the date of rejection. Until the actual official act, he can only intend and prophesy. Many things may occur, and frequently have occurred, to prevent the official act from happening. In many instances claims as to which letters of intention to disallow were sent were subsequently allowed in whole or in part. This has occurred often in counsel's own experience. Among the things which may prevent disallowance, after the letter of intention to disallow, are: (1) a new Commissioner may take office, who is not bound to carry out the intention of his predecessor; (2) a controlling court decision may be handed down, which would compel a different course of action; (3) the subordinate officials may change their recommendation to the Commissioner, due to discovery of new facts,

or to a change in regulations or Bureau policy; (4) Congress may enact a statute requiring allowance of the claim. The letters of intention to disallow at an indefinite future date are transcripts of the recommendations of subordinate officials to the Commissioner which are presented with the schedule which he must approve in order to officially disallow the claims, and are not notices *after* the disallowance.

It is true that the letters of intention to reject were sent only about three weeks prior to the rejections, but if they had been sent only the day before, the taxpayers would have been no better informed as to the date the statute began to run against him. The letters of intention referred to an indefinite time in the future, for the reason that it was not known in advance when the schedule and recommendations would be delivered to the Commissioner for his approval. The taxpayers were entitled to two full years after the rejection within which to sue, but this provision availed them nothing unless they were informed when their claims were rejected so that they could calculate the time when the two years would expire.

It is submitted that a letter stating, "Your claim will be rejected sometime soon," or "in two or three weeks," is not a substantial compliance with the requirement that

> "The Commissioner *shall* within 90 days *after* any such disallowance notify the taxpayer *thereof* by mail."

The Attorney General argues that the re-enactment of this provision without change in the Revenue Act of 1926 shows Congressional approval of the practice adopted by the Treasury Department. It is indeed difficult to understand how re-enactment of a provision requiring notice shows legislative approval of the continued absolute disregard of that provision. On the contrary, the re-enactment of the provision indicates emphatically the intention that it be complied with. Congress cannot enforce its mandatory provisions, that being the function of the judiciary.

The strongest expression it could make of its intention that the provision be carried out was re-enactment without change.

Conclusion.

The Commissioner failed to carry out a mandatory provision of Section 3226 of the Revised Statutes, as amended, that within ninety days after disallowance of a claim for refund he shall notify the taxpayer thereof by mail. The respondents received no notice of such disallowance, and two years after such disallowance elapsed without suit being brought. The only way to remedy the wrong and enforce the mandatory provision is to hold, as the Circuit Court of Appeals did, that the statute of limitations did not begin to run.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DONALD HORNE,
MORTIMER J. WOHL,
Attorneys for Respondents.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

Nos. 79, 80.—October Term, 1930.

The United States of America, Petitioner, 79 *vs.* Theodore Michel.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
The United States of America, Petitioner, 80 *vs.* Louis Krieger.	

[February 24, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

These actions were brought in the District Court for the Southern District of New York. Each respondent sued to recover income taxes incorrectly determined for 1919 and paid in 1920. On defendant's motion in the nature of a general demurrer that court dismissed. The Circuit Court of Appeals reversed. 37 F. (2d) 38.

The sole question is whether the actions were commenced within the time allowed by R. S., § 3226, as amended. 26 U. S. C., § 156.

In 1924, Michel on February 7, and Krieger on September 15, filed a claim for refund. The Commissioner of Internal Revenue by a letter dated August 17, 1925, advised Michel that his claim would be rejected and that the rejection would officially appear on the next schedule to be approved by him. The claim was rejected September 2. The Commissioner, April 2, 1925, sent a like letter to Krieger, and his claim was rejected April 20. The Commissioner did not give notice to either of them that his claim had been disallowed or the date of disallowance until June 27, 1928. The suits were subsequently brought more than two years after the rejections and less than two years after the notices.

Section 3226 as amended provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have

> been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue . . . . No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

By this statute the United States waived its sovereign immunity from suit. The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period, and is limited to not more than five years after payment of the tax unless the claim has been disallowed and the action is commenced within two years from the disallowance.

Neither of these claims was rejected within six months after filing. And in each case more than two years elapsed after rejection before the Commissioner sent notice that the claim had been disallowed. Neither action was commenced within five years after payment of the tax or within two years after disallowance of the claim. The taxpayers contend, and the Circuit Court of Appeals held, that the permission to sue continues for two years after notice that the claims had been disallowed and that therefore these actions were commenced within time.

As the Commissioner did not act within six months, permission to sue did not depend upon the rejection of the claim or upon the giving of the notice. By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months and continued uninterruptedly through the five-year period following the date of payment and until "two years after the disallowance". While the statute declares that the Commissioner within a specified time shall notify the taxpayer that his claim has been disallowed, it is nowhere stated that the Commissioner's failure to give the notice will in any event operate to extend the time for bringing suit. An implication to that effect cannot prevail against the rule expressly stated. It is clear that where the Commissioner renders no decision within six months the

section contemplates that before commencing his suit the taxpayer will ascertain by inquiry whether the Commissioner has acted. This at least suggests that it may be the intention of the Act to leave a like burden upon claimants in all cases.

Provisions in tax laws limiting the time within which the United States may enforce the payment of taxes by distraint or suit are to be interpreted liberally in favor of the taxpayers. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346. *United States* v. *Updike*, 281 U. S. 489. But it is also well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 686. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375-376. There is nothing in the legislative history of the provision to indicate an intention that the two-year period should not commence upon the disallowance of the claim or that it should be extended by the failure of the Commissioner to give the specified notice.*

Having regard to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit, the clause reasonably may be read merely as a direction to the Commissioner to send the notice to claimant without making the failure so to do have the effect of enlarging the period for suing as otherwise definitely prescribed.

The permission to each of the plaintiffs to bring suit expired two years after his claim was disallowed.

Judgments reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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*Senate Report No. 1137, 67th Congress, 4th Session, p. 5. House Report No. 1757, 67th Congress, 4th Session, p. 3.